80-689

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, *et al.*
Petitioners

vs.

CLARK VINCENT, *et al.*
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Is it a violation of the establishment clause of the First Amendment to the United States Constitution to allow a recognized student group to hold regular reoccurring religious worship services or to have religious teaching sessions in buildings of or on the grounds of a tax-supported public institution of higher education?

2. Does the free exercise clause of the First Amendment to the United States Constitution or the freedom of speech clause of the First Amendment to the United States Constitution take precedence over the establishment clause of the First Amendment to the United States Constitution?

3. Does the mandate of the state constitution of the State of Missouri requiring strict separation of church and state when it comes to the use of the facilities of a tax-supported public institution of higher education for regular religious worship services or religious teaching by a recognized student group, provide a sufficiently compelling interest to justify an interference with or infringement upon the free exercise rights under the First Amendment to the United States Constitution of the students?

4. Is the campus, including buildings, sidewalks and grounds, of a tax-supported public institution of higher education, a "public place" or "open forum" similar to public parklands, and, if so, does that fact require the tax-supported public institution of higher education to make its facilities available for the regular religious worship services of or religious teaching by a recognized student group?

PARTIES TO THE PROCEEDING IN THE EIGHTH CIRCUIT

Clark Vincent and Jonathan Williams were the plaintiff-appellants to the United States Court of Appeals for the Eighth Circuit.

Gary Widmar, The Board of Curators of the University of Missouri, Barbara Berkmeyer, Daniel L. Brenner, Robert A. Dempster, William T. Doak, C. R. Johnston, Marian Oldham, Wallace R. Stacey, Rex Z. Williams and Van O. Williams were the defendant-appellees in the United States Court of Appeals for the Eighth Circuit. (Mrs. Berkmeyer and Mr. Van O. Williams have been replaced as members of the Board of Curators by Mr. David Lewis and Mr. William Cocos).

Bible Study, a student organization at the University of Missouri-St. Louis; the Christian Legal Society of the University of Missouri at Kansas City; Cornerstone, a student organization at the University of Missouri-Kansas City; the International Society for Krishna Consciousness; and the Holy Spirit Association for the Unification of World Christianity filed Brief Amici Curiae with the Eighth Circuit Court of Appeals.

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No.

IN THE

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PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not presently reported, but is set forth in the Appendix, *infra,* at A-1. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing or hearing by the Court en banc, including the dissent of Judges Bright and McMillian, entered on the 19th day of September, 1980, is set out in the Appendix, *infra,* at A-21. The order staying the mandate of the United States Court of Appeals for the Eighth Circuit, entered on the 30th day of September, 1980, is set out in the Appendix, *infra,* at A-25. The findings of the United States District Court for the Western District of Missouri is reported at 480 F. Supp. 907 (W.D. Mo. 1979) and is set out in the Appendix, *infra,* at A-26.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was filed on August 4, 1980. The petition for rehearing or hearing en banc was denied on September 19, 1980. The order staying the mandate was issued by the United States Court of Appeals for the Eighth Circuit on September 30, 1980. The jurisdiction of this honorable court rests on 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States Constitution. The First Amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceable to assemble, and to petition the government for a redress of grievances.

This case also involves the following provisions of the Constitution of the State of Missouri:

> That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same. Article I, Section 6, Constitution of the State of Missouri, 1945.
>
> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher,

minister or teacher thereof, as such and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship. Article I, Section 7, Constitution of the State of Missouri, 1945.

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or oter institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever. Article IX, Section 8, Constitution of the State of Missouri, 1945.

The following regulations from the Collected Rules and Regulations of the University of Missouri are also involved in this case:

No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Studen congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for

religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to suc buldings as may be designated under provision of part .0106. Section 4.0314.0107 of the Collected Rules and Regulations of the University of Missouri.

Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group. Section 4.0314.0108 of the Collected Rules and Regulations of the University of Missouri.

STATEMENT OF THE CASE

On October 13, 1977, twelve students who were attending the University of Missouri-Kansas City, including the Respondents Clark Vincent and Jonathan Williams, filed a complaint in the United States District Court for the Western District of Missouri, Western Division, seeking injunctive relief and a declaratory judgment that certain regulations of the University of Missouri were unconstitutional and void. Your Petitioners, Dr. Gary E. Widmar, than Dean of Students at the University of Missouri-Kansas City; the University of Missouri; and the then individual members of the governing board of the University of Missouri were named as defendants. The students later sought permission to file an amended complaint and did so on or about July 18, 1978. The facts of the case were stipulated to by the parties in documents filed with the trial court and the matter was submitted to Judge William R. Collinson on cross-

motions for summary judgment. On December 11, 1979, Judge Collinson granted the motion for summary judgment of the defendants and denied the motion of the students, hereby upholding Section 4.0314.0107 and Section 4.0314.0108 of the regulations of the University of Missouri. The lower Court held that the students' complaint included allegations that they had been deprived, under color of state law, of rights and privileges guaranteed by the United States Constitution and that those allegations were a sufficient basis for the Court to exercise jurisdiction over the plaintiffs' claims under 28 U.S.C. Section 1343. see Appendix, *infra,* at A-37. Johnathan Williams and Clark Vincent subsequently filed their timely appeal of the District Court judgment with the Eighth Circuit Court of Appeals. The Eighth Circuit held that the University's regulation Section 4.0314.0107 was not required by the establishment clause of the First Amendment and was invalid because of the burden it placed upon the rights guaranteed to the students by the First and Fourteenth Amendments of the federal Constitution. see Appendix, *infra,* at A-20.

Clark Vincent and Jonathan Williams (hereinafter referred to as "Respondents") were involved in Cornerstone and participated in Cornerstone activities. see Appendix, *infra,* at A-27. Cornerstone was and is an officially recognized student organization on the campus of the University of Missouri-Kansas City, which is a part of the University of Missouri four-campus system governed by the Board of Curators, an official nine-person body established by the Constitution of the State of Missouri for the government of the University of Missouri. see Appendix, *infra,* at A-26—A-27. The avowed purpose of Cornerstone is to promote a knowledge and awareness of Jesus Christ on the campus, and, to encourage others in the faith and to grow in the grace and knowledge of the Lord Jesus Christ. see Appendix, *infra,* at A-32.

One of the benefits afforded recognized student organizations is the privilege of using the Student Center and certain

other facilities on the campus of the University of Missouri-Kansas City as a place to meet. see Appendix, *infra,* at A-27 . Each student enrolling at the University of Missouri-Kansas City pays a "Center Activities-Athletic Fee," the proceeds of which go, in part, to fund the operations of the student center. see Appendix, *supra,* at A-27. Although various religious groups, including Cornerstone, have been permitted to meet in the facilities of the University in the past, neither the Chancellor nor the Dean of Students of the University of Missouri-Kansas City ever authorized a student organization to utilize a University facility for a meeting where they had full knowledge that the purpose of the meeting included religious worship or religious teaching. see Appendix, *infra,* at A-31 . In early January, 1977, pursuant to established University procedures, Cornerstone sought permission to use Rooms 103 and 113 of the Haag Hall Annex, on a regular basis, for its Saturday night meetings. see Appendix, *infra,* at A-28. While the application for use stated that the purpose of the meeting would be to "promote a knowledge of Jesus Christ among students," the meetings were to be open to the general public. University officials sought clarification as to the activities to be conducted at the proposed meetings and were advised that typical Cornerstone meetings in University facilities usually included the following:

1. The offering of prayer;

2. The singing of hymns in praise and thanksgiving;

3. The public reading of scripture;

4. The sharing of personal views and experiences (in relation to God) by various persons;

5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and

6. An invitation to the interested to meet for a personal discussion.

The University was also advised by Cornerstone's attorney that worship was an important part of the general atmosphere of the meetings and that there was no doubt that the "undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting Jesus Christ both for salvation and for the power to live an abundant Christian life on earth." see Appendix, *infra,* at A-30. These facts were confirmed by the statements of one of the members of Cornerstone who indicated that the intended program for these meetings consisted of Bible study and teaching, prayer, informal sharing, and singing and that the purpose was to "attract the uninvolved so that the answers to life's ultimate questions rest with Jesus Christ and the Bible." see Appendix, *infra,* at A-33.

Cornerstone's application was rejected by the University on or about February 4, 1977, because it was concluded that the conduct of the proposed meeting would be in violation of University regulations 4.0314.0107 and 4.0314.0108. see Appendix, *infra,* at A-28. While Cornerstone was not permitted to hold meetings of the type described in their application of early January, 1977, it does remain an active officially recognized student organization on campus. see Appendix, *infra,* at A-31—A-32. The members thereof continued to practice their beliefs and continued to meet off-campus. see Appendix, *infra,* at A-31—A-35.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioners respectfully submit that this case, and the issues raised therein, is one of extreme importance dealing with difficult questions of law which should be reviewed and answered by this Court. This case, as finally decided, will affect and impact on every public college and university, not only in the Eighth Circuit, but in the United States. This case, as finally decided, will affect every student who attends or plans to attend a public college or university in this country. This case, as finally decided, will have an effect upon all tax-paying citizens of this country, whether or not they intend to send their children to a public college or university for an education. This case, as finally decided, is also of extreme interest and import to all organized churches and every religious group in this country, both those wishing to maintain and preserve the separation heretofore understood to be required by the establishment clause and those who would welcome any new opportunity to receive governmental support or assistance in their sectarian efforts.

There are several reasons why this particular case is of such importance and impact. First, it is a case of first impression in the federal Courts of Appeal. Secondly, the opinion of the three-judge panel of the Eighth Circuit is in opposition to the two federal district court opinions which had previously addressed the direct issue of religious worship services on the campus of a public college or university. *Chess* v. *Widmar,* 480 F. Supp. 907 (W.D.Mo. 1979) and *Dittman* v. *Western Washington University,* ____F. Supp. ____, Cause No. C79-1189V (W.D. Washington 1980) (now on appeal to the Ninth Circuit). See also *Pratt* v. *Arizona Board of Regents,* 110 Ariz. 466, 520 P.2d 514 (Banc 1974) and compare *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975), cert. denied

424 U.S. 934 (1976).[1] Third, the opinion of the three-judge panel of the Eighth Circuit Court of Appeals not only does not discuss or review what should be considered as pertinent and applicable Supreme Court "establishment clause" precedent, (cases from the education area such as *Abington School District* v. *Schempp,* 374 U.S. 203 (1963); *McCollum* v. *Bd. of Education,* 333 U.S. 203 (1948); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *Committee for Public Education & Religious Freedom,* 413 U.S. 756 (1973); and *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971)) the panel appears to have ignored them completely in making its decision. Petitioners submit that this is the only conclusion which can be drawn since the conduct with the Eighth Circuit purports to allow here "...has been proscribed by the Supreme Court on numerous occasions." *Brandon* v. *Board of Education,* 487 F. Supp. 1219, 1229 (W.D.N.Y. 1980). Finally, and perhaps most importantly, the case, as it now stands, makes *substantial* inroads on the previously understood meaning of the establishment clause of the First Amendment to the United States Constitution. The opinion of the Eighth Circuit Court of Appeals now requires a public college and university to open up its buildings and grounds, supported and maintained by public tax monies, to *regular* religious worship services, to religious teaching, and to proselytizing and evangelism of students, and others rightfully on campus, by students. The opinion of the Eighth Circuit also is troubling because of its implications that religious worship is merely "religious speech" and because of

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[1]Judge Collinson's opinion illustrates why this opinion is not supportable by Supreme Court precedent. *Chess* v. *Widmar,* 480 F. Supp. 907, 916-917 (W.D. Mo. 1979), see Appendix, *infra* at A-42—A-44. Petitioners submit the case can also be distinguished by the following: There is no reference to any organized student group being involved; (2) the case dealt with an area in the students' living quarters; (3) there was no indication that the services were intended to be open to the public; and (4) there were apparently no prohibitions contained in the Constitution of the State of Delaware.

the unescapable suggestion of the opinion that the freedom of speech clause and/or the free exercise clause take precedent over the establishment clause. *Vincent* v. *Widmar,* Slip Opinion, pages 11-15, see Appendix, infra, at A-9—A-12. Petitioners submit that an erosion of the establishment clause of this magnitude must be reviewed and considered by the Supreme Court.

At the district court level, Judge Collinson held, *inter alia,* that the University's ban on religious services and worship, as implemented by its regulations, was required by the establishment clause of the First Amendment. *Chess* v. *Widmar,* 480 F. Supp. 907, 916 (W.D. Mo. 1979), see Appendix, *infra,* at A-42. However, the three-judge panel of the Eighth Circuit did not believe the use of the University's facilities for religious worship or religious teaching was an establishment of religion because it did not agree that such a policy would have the primary effect of advancing religion. *Vincent* v. *Widmar,* Slip Opinion, page 16, see Appendix, *infra,* at A-13. However, in so finding the Eighth Circuit ignored the Supreme Court's warning that aid will "...normally be thought to have a primary effect of advancing religion...when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). The Eighth Circuit has also ignored facts clearly indicating that the students involved in Cornerstone were seeking the imprimatur of the University, and therefore the State of Missouri, for advancement of its religious purposes. *Chess* v. *Widmar,* 480 F. Supp. 907 at 911-913. See Appendix, *infra,* at A-33—A-35. Petitioners contend that this is a vice which worried the framers of the Constitution and which the Establishment Clause was intended to prevent. *School District of Abington Township Pa.* v. *Schempp,* 374 U.S. 203, 228 (1963) (Douglas J., concurring). The Eighth Circuit did discuss *Tilton* v. *Richardson,* 430 U.S. 672 (1971), a case which the District Court found controlling, *Chess* v. *Widmar,* 480 F. Supp. 907, 915, see Appendix, *infra,* at A-41—A-42, and attempted to distinguish it. *Vincent* v. *Widmar,* Slip Opinion

pages 21-22, see Appendix, *infra,* at A-17—A-18. However, Petitioner would submit that the attempt at distinction is distorted and improper. Petitioners further submit that *Tilton* was concerned with more than the potential for "exclusive control" of a building by a certain college as expressed by the Eighth Circuit. Petitioners believe that the Supreme Court felt that if the building was used, in any way,

> "...to promote religious interests, the original federal grants will in part have the effect of advancing religion." *Tilton,* 430 U.S. at 683.

Petitioners respectfully submit that the three-judge panel has ignored the intent, content, and meaning of important Supreme Court decisions and the body of "establishment clause" law formed therein. The three-judge panel has also ignored the inevitable conclusion that under the law as set forth by the opinions of this honorable court, there is an impermissable advancement of religion in the case at bar.

Petitioners would further submit that the opinion of the three-judge panel also misinterprets or ignores the Constitution of the State of Missouri. The Missouri Constitution, and particularly Sections 6 and 7 of Article I, and Section 8 of Article IX, as set forth earlier, makes it quite clear that the people of Missouri intended a more restrictive provision than that contained in the establishment clause of the First Amendment to the federal Constitution. This is a fact *long* recognized by the Supreme Court of Missouri. *Paster* v. *Tussey,* 512 S.W.2d 97 (Mo. Banc. 1974), cert. denied, 419 U.S. 1111 (1975); *Harfst* v. *Hoegen,* 163 S.W.2d 609 (Mo. Banc. 1942); *Americans United* v. *Rogers,* 538 S.W.2d 711 (Mo. Banc. 1976), cert, denied, 429 U.S. 1029 (1976); and *Mallory* v. *Barrera,* 554 S.W.2d 556 (Mo. Banc. 1976). Furthermore, this intent of the Missouri Constitution has been accepted and approved by the federal judiciary, including this honorable Court. In *Luetkemeyer* v. *Kaufmann,* 364 F. Supp. 376 (W.D. Mo. 1973), affd. 419 U.S. 888 (1974), the Court said at page 386:

> We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a "compelling state interest in the regulation of a subject within the State's constitutional power[.]" * * * That interest, in our judgment, satisfies any possible infringement of the Free Exercise Clause of the First Amendment or of any other prohibition in the Constitution of the United States. * * *
>
> The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question. The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter.

Unfortunately, the three-judge panel makes reference to and "discusses" this extremely important aspect of the case only by way of a single footnote. *Vincent* v. *Widmar,* Slip Opinion, page 15, note 7, see Appendix, *infra,* at A-12. Petitioners believe that the dissenting opinion of Judges Bright and McMillian written in response to Petitioners' Motion for Rehearing or Hearing in Banc, successfully and succintly describes the three-judge panel's handling of this issue:

> In our judgment that footnote inadequately addresses this serious and important contention. The *text does not respond to this issue,* and the panel's rejection of this contention because of the lack of "concern" demonstrated by the University for separation of church and state *disregards the real issues*--whether the State Constitution mandates strict separation of church and state when it comes to use of University buildings for formalized or denominational

> worship services by a student group, and whether that mandate overrides any infringement of the students' free exercise rights under the United States Constitution. (Emphasis Supplied). Appendix, *infra,* at A-23.

The three-judge panel also indicated that the University campus is an open forum similar to the National Mall and other parkland. *Vincent* v. *Widmar,* Slip Opinion, pages 19-21, see Appendix, *infra,* at A-15—A-17. Petitioners submit this comparison is unjustified and improper. Petitioners contend that the campus of a state university is dedicated to one special function and that is education. *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927, 933 (N.D. Ill. 1968). The uses of students of their campus at their campus cannot compare to the magnitude of different peoples, ideas, purposes and events that occur at the National Mall or in the public parks of this country. (Nor can a college campus be reasonably compared to an airport or other public transportation terminal.) There should be no dispute that the National Mall, because of its strategic location, and past historical usage, has become an area not associated with or considered as owned by the U.S. government. It is an area where groups of any persuasion, and any group, fringe or legitimate, can go to hold an event, demonstrate, or "make a statement." Query, would the same be true of the U.S. Capitol Building? the Executive Office Building? the Treasury Building? the Supreme Court Building? It is doubtful that religious worship services of a regular reoccurring nature or on a infrequent basis would be approved in these buildings because they are so closely associated with the government. Likewise, there can be no disputing the association of the buildings of the University to the University itself and thereby the State of Missouri. Petitioners agree with Judges Bright and McMillian that there is

> "... considerable doubt that cases which permit expression of political and religious views in public places require that

> state institutions make its facilities available for denominational religious services." Appendix, *infra,* at A-24.

Even if these cases were somehow deemed applicable, Judge MacKennon's concurring opinion in *O'Hair* v. *Andrus,* 613 F.2d 931 (D.C. Cir. 1979) is enlightening. In that opinion, at page 938, he makes clear that

> "...authorizing special events of a religious nature on widely separated occasions in one thing so far as the establishment clause is concerned and *to do so on a regular basis is another thing.*" (Emphasis Supplied).

CONCLUSION

During oral argument of this case on May 21, 1980, at St. Paul, Minnesota, Senior Circuit Judge Floyd Gibson, a member of the three-judge panel, indicated that this matter would be a good case for the Supreme Court of the United States. Judge Bright and McMillian of the Eighth Circuit have characterized the case as raising "important issues" and "troubling questions." see Appendix, *infra,* at A-21;A-24. Petitioners can only whole-heartedly agree. The present decision in the Eighth Circuit, in Petitioners opinion, does not adequately address the issues raised, nor does the decision properly consider the previous decisions of this honorable Court. Petitioners believe that the questions presented in the petition for the granting of a writ of certiorari are extremely important ones for the public colleges and universities of the United States; for students; for taxpayers and parents; for churches and religious groups; and for the people of this country interested in maintaining our nation as envisioned by the wisdom of the Constitution. Petitioners would welcome the opportunity to more clearly address and brief, for the Court's benefit, the issues raised and therefore respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 4, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1048

Florian Frederick Chess, Dale Rhoton, Ronald Barnes, Glenn P. Garrison, Kathleen Anne Aguirre, Douglas Neef, Clark Vincent,
Appellant,

James S. Colmer, Jr., Dawn B. Wallace, Jonathan Williams,
Appellant,

Malinda Ann McMurry and Katherine Cyman,

v.

Gary E. Widmar, The Board of Curators of the University of Missouri, Barbara Berkmeyer, Daniel L. Brenner, Robert A. Dempster, William T. Doak, C. R. Johnston, Marian Oldham, Wallace R. Stacey, M.D., Rex Z. Williams and Van O. Williams,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: May 21, 1980
Filed: August 4, 1980

Before GIBSON, Senior Circuit Judge, and HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

This appeal presents the question of whether the University of Missouri-Kansas City, which permits recognized student organizations to use the student center, certain other buildings and the grounds of the University for political, cultural, educational, social and recreational events, may prohibit a recognized student group from using these same facilities for religious worship services or teaching. We hold it may not.

I

BACKGROUND

With the goal of making student free-time activity a cooperative aid to academic study,[1] the University of Missouri-Kansas City (UMKC) encourages the formation of student

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[1] The University bulletin describes the student activities program as follows:

> The student activities program is coordinated by the STUDENT ACTIVITIES OFFICE located in the University Center. Through various student organizations, boards and committees, cultural, social, educational and recreational programming is provided. The aim is to make student free time activity, a cooperative aid to academic study.
>
> In all its functions the student activities program encourages self-directed activity. This provides a great opportunity [for] self-realization and individual growth while participating in programming for the entire student population or for a special interest group. The overall goal is to develop social and cultural awareness as well as intellectual curiosity. Students plan events and programs in such a way that they learn while working and find enjoyment at the same time.
>
> In extracurricular affrairs, students govern themselves in accordance with the All Student Association (ASA) constitution. The legislative body is the Student Council, a representative group of students elected annually by the student body. The ASA recommends funding and acts as an advocate of student rights.

organizations, boards and committees. The University officially recognizes over ninety student organizations. The University's

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Activities provide an excellent opportunity for all students to meet and work with the administration and faculty, as well as local community groups. Social and fiscal responsibility and leadership in our democratic society [are] a prime requirement for the educated individual. Student activities [program] attempts to provide opportunity in these areas.

Most activities and the ASA offices are housed in the University Center which is dedicated to serving the social, co-curricular and cultural needs of UMKC. Student programs in the University Center often include lectures, symposia, concerts, discussions, receptions, chess and bridge tournaments, as well as many other special events sponsored by the ASA and its programming division, the University Program Council.

In a memorandum on UMKC's Student Activity Fee, Assistant Dean Paul Parker described two of the sponsored programs:

CAMPUS WIDE PROGRAMS—The Intramural Sports Program, Communiversity, the *University News*, the University Program Board, the Cultural and entertainment activities of the University Program Board and the Student Services Commission, all represent programs which have campus-wide appeal and interest. In general, these types of programs span the distance between school council programs and those of ethnic and/or special interest groups. Without this segment of student programming being active and creative, the campus' social, cultural, entertaining, and service needs would go unmet.

SPECIAL INTEREST GROUPS—Just as the University is responsive to the various educational needs of society, it must also be responsive to the various ethnic and non-academic special interest groups within the University. The University has officially recognized over 90 active student organizations, each with its specific area of interest. Ethnic organizations, such as Jewish College Students, United Mexican American Students, and The Afro-American Student Union, focus on the issues and concerns of their particular ethnic heritage. There are political organizations, such as Young Socialist Alliance, Women's Union, Young Democrats, and so forth. Also, there is a broad spectrum of nonethnic special interest groups such as the Fencing Club and Bridge and Chess Club, the Karate Club, Mortar Board, Omicron Delta Kappa, etc. These groups are formed by students to provide another dimension to the student's life on campus—the extra and co-curricular experience.

past and present policy is to permit recognized student groups to use the student center and certain other UMKC facilities for their lectures, discussions, symposiums, meetings, events and programs. Each student is required to pay a student activity fee of $41.00 per semester (1978-1979) to help defray the costs of these activities.

Appellant Cornerstone is, and for at least four years has been, an officially recognized student organization on the UMKC campus. It has a nucleus of about twenty active students and its on-campus meetings and events have been attended by up to 125 people.

From 1973 until 1977, Cornerstone sought and obtained permission to use University facilities for its weekly meetings and events. In 1977, however, this practice was terminated by the Unversity on the ground that Cornerstone's meetings violated regulations adopted by the Board of Curators in 1972. The full text of these regulations, which prohibit the use of University buildings or grounds for purposes of religious worship or religious teaching, is as follows:

> 4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. Student congregations of local churhes or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other con-

struction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group.[2]

The University's enforcement of this regulation began with Cornerstone's January 5, 1977, request to continue its use of a particular lecture hall for Saturday night meetings during the spring term. On the University's request form, Cornerstone stated that its purpose was to "promote a knowledge of Jesus Christ among students" and listed the subject of the proposed meetings to be "various topics relating to Christianity and the Bible." The request stated that the meetings and events would be open to the public, no University funds would be used, no admission would be charged and no donations would be solicited. The Dean of Students met with Cornerstone representatives and requested more information regarding the nature and purpose of their meetings. In response, Cornerstone's attorney submitted a letter containing this direct and candid description:

> Typical Cornerstone meetings in University facilities usually include the following:
>
> 1. The offering of prayer;

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[2] We note that the parties have stipulated that there is no chapel on the UMKC campus.

2. The singing of hymns in praise and thanksgiving;

3. The public reading of scripture;

4. The sharing of personal views and experiences (in relation to God) by various persons;

5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and

6. An invitation to the interested to meet for a personal discussion.

As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.

Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere. There also is no doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.

There are no collections or solicitations of funds at these meetings, and there are no specific rituals or practices of any particular denomination or sect.

Relying on this letter, the University concluded that Cornerstone's meetings would violate its regulations and denied the application on February 4, 1977. The University later refused the group's request to hold small group Bible studies on the University lawn.

In response to these refusals, eleven student members of Cornerstone initiated this action in federal district court, alleging

that the University had violated their rights under both the federal and state constitutions. They claimed, *inter alia*, that the University had deprived them of their rights to free exercise of their religion, freedom of speech and equal protection of the law. Named as defendants were the University's Board of Curators and the Dean of Students. At a pretrial conference, the parties agreed that the case could be submitted on stipulated facts. After the stipulation was filed, cross-motions for summary judgment were made.

On December 11, 1979, the district court granted the defendants' motion and denied the plaintiffs'. It characterized the issue as "whether the university's ban on religious activities in university-owned buildings is required by the establishment clause of the first amendment," *Chess* v. *Widmar*, 480 F. Supp. 907, 914 (W.D. Mo. 1979). Using the familiar establishment clause analysis,[3] the district court determined that a neutral policy accommodating all student groups in their use of the Unversity's facilities would clearly reflect a secular legislative purpose and would avoid excessive entaglement with religion. But, analogizing the facts before it to those faced by the Supreme Court in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the court found that "a university policy permitting regular religious services in university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion." *Chess* v. *Widmar, supra*, 480 F. Supp. at 915-916. It concluded "that the university's present ban on religious services in its buildings is *required* by the establishment clause." *Id.* at 916 (emphasis added).

Notwithstanding this conclusion, the court then considered whether this ban ran afoul of rights guaranteed by other clauses, particularly the Free Exercise Clause. Initially, it found that no free exercise right was violated since it did not appear that the

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[3] *See infra*, p. 15.

"'practice' of holding religious services in a university-owned building is a matter of deep religious conviction to [these] plaintiffs." *Id.* at 917. Second, it concluded that the infringement, if any, of plaintiffs' free exercise rights was justified by a compelling state interest—Missouri's "long history of strict separation of church and state." *Id.* Finally, the court dismissed the argument that the Free Exercise Clause prevails if the Establishment and Free Exercise Clauses conflict, finding that the conflict is illusory because the two clauses are aimed at separate evils. *Id.* at 917-918.

The plaintiffs also argued that the University's regulations act as a prior restraint on their free speech rights. Characterizing this as an argument that the Establishment Clause is subordinate to the Free Speech Clause, the court rejected it, commenting that "speech with religious content cannot be treated the same as any other form of speech." *Id.* at 918. Citing to *Abington School District* v. *Schempp,* 374 U.S. 203, 219 (1963) (quoting Mr. Justice Rutledge's dissent in *Everson* v. *Board of Education,* 330 U.S. 1, 63 (1947)), the district court suggested that "secular intellectual liberties" were entitled to a higher degree of protection than "religious activity." *Chess* v. *Widmar, supra,* 480 F. Supp. at 918.

The court next rejected the plaintiffs' argument that the University had denied them equal protection of the laws. It distinguished *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953), on two grounds: First, unlike the situation in *Fowler,* in this case there is no discrimination among, as opposed to against, religious groups. Second, in this case, public buildings, as distiguished from a public park, are involved. *Chess* v. *Widmar, supra,* 480 F. Supp. at 919. The court acknowledge that "if the university's regulations were being applied to prohibit plaintiffs from conducting religious services on the grounds, sidewalks, or streets of the university, plaintiffs' equal protection argument would have some force," *id.,* but it did not discuss the stipulated facct that the University refused to permit Cor-

nerstone to hold Bible studies on the University's lawn. It omitted this incident from its analysis on the grounds that the complaint challenged "only the denial of the use of university-owned *buildings*." *Id.* (emphasis added).[4]

Finally, the court rejected plaintiffs' contention that the University's regulations were unconstitutionally vague and overbroad since the regulations' language closely tracked that approved in *Tilton*. *Id.* at 919-920.

II

ANALYSIS

We begin with the proposition that religious speech, like other speech, is protected by the First Amendment.[5] *See Fowler* v. *Rhode Island, supra; Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). Similarly, the freedom to associate for the advancement of religious beliefs is no less protected than the freedom to associate for the advancement of beliefs that are political, economic or cultural in nature.

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of

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[4] We think this omission was clear error. Both the original and the first amended complaint refer to "university facilities," not just to University buildings, and this term is broad enough to include the University's grounds.

[5] The protection afforded religious speech is derived from the Free Exercise Clause, the Free Speech Clause, or both. *See Schaumburg* v. *Citizens for a Better Environment,* 63 L.Ed.2d 73, 82-83 (1980).

> the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

NAACP v. *Alabama,* 357 U.S. 449, 460-461 (1958) (emphasis added and citations omitted).

It is also fundamental that equal access to a public forum cannot be restricted because of the content of the message.

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Carey v. *Brown,* 48 U.S.L.W. 4756, 4758 (June 20, 1980) (No. 79-703) (quoting *Police Dept.* v. *Mosley,* 408 U.S. 92 (1972) (footnote omitted)); *see Fowler* v. *Rhode Island, supra; Niemotko* v. *Maryland,* 340 U.S. 268 (1951).

The principles stated—freedom of religious expression and equal access to a public forum—are significant here. The University has undertaken to aid in the growth and development of the "social and cultural awareness" of its students by

recognizing their self-directed activities and by permitting authorized groups to use the student center and other of its facilities for meetings, discussions, symposiums, programs and events. It has created an open forum for the activities of its recognized student groups. It has placed only one limitation on those activities: no religious worship or religious teaching may take place.

If the University's limitation applied to *all* religious speech, it would clearly be invalid. Absent a compelling state interest, the University does not have the rigt to deny a recognized student group access to its facilities solely on the basis of the content of the group's speech. *See Healy* v. *James,* 408 U.S. 169 (1972); *Gay Lib* v. *University of Missouri,* 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978); *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975), *cert. denied,* 424 U.S. 934 (1976).[6] The University concedes as much. It contends,

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[6] In *Healy* v. *James,* 408 U.S. 169 (1972), a student group seeking to organize an on-campus chapter of the Students for a Democratic Society was denied official recognition by a state college. Noting that the most important effect of the denial was the group's resulting inability to use the campus facilities for its meetings, *id.* at 176, the Court found the denial's effect was "a form of prior restraint" and that "a 'heavy burden' rests on the college to demonstrate the appropriateness of that action." *Id.* at 184.

In *Gay Lib* v. *University of Missouri,* 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978), this Court considered a similar denial of official recognition by the University of Missouri to a student group seeking "to provide a forum for discussion about homosexuality." *Id.* at 850. Noting, as did *Healy,* that the denial was a prior restraint on free speech, we found that "the restriction of First Amendment rights in [this] context may be justified only by a far greater showing of a likelihood of imminent lawless action than that presented * * *." *Id.* at 855.

In *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975), *cert. denied,* 424 U.S. 934 (1976), the court concluded that a state university's prohibition on religious worship services in campus facilities, as applied to religious groups seeking to use the common room of a dormitory, impeded the observance of religion and could only be justified by the showing of a compelling state interest for the regulation.

however, that its limited regulation permitting some religious speech, but prohibiting religious worship or religious teaching in its buildings or on its grounds, is constitutionally required to avoid an establishment of religion.[7] The district court accepted the University's argument. We cannot.

A framework for analyzing Establishment Clause problems was articulated in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971) (quoting *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970)), as follows:

> First, the [governmental regulation] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances not *inhibits religion* * * *; finally, the [regulation] must not foster "an excessive governmental entaglement with religion." (Emphasis added.)

The district court, in applying this analysis, recognized that "A [neutral] university policy that permitted *any* student group to meet in university-owned buildings for *any* purpose would aid all student groups, regardless of religious affiliation and would, therefore, reflect a clear secular purpose. In addition, since such a policy would make no distinction between groups or their purposes, entanglement with religion would be completely avoided." *Chess* v. *Widmar, supra,* 480 F. Supp. at 914

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[7] The University also contends that Missouri's long history of strict separation of church and state constitutes a compelling state interest that justifies burdening appellants' First and Fourteenth Amendment rights. *See Luetkemeyer* v. *Kaufmann,* 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd,* 419 U.S. 888 (1974). For the reasons stated in the text, we disagree. Moreover, it is difficult to believe that the University is as concerned with the strict separation of church and state as it here contends. The regulation at issue specifically states that the ban on the use of University facilities for religious worship or teaching is not to be interpreted "to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities." Regulation No. 4.0314.0107. This exception creates a greater danger of placing the University's imprimatur on religion than would granting Cornerstone's request for a meeting place.

(emphasis in original). It went on to hold, however, that a neutral policy would be impermissible because it would have the primary effect of advancing religion. *Accord, Dittman* v. *Western Washington University,* No. C79-1189V, slip op. at 4-5 (W.D. Wash., Feb. 27, 1980), *appeal docketed* No. 80-3120 (9th Cir., Apr. 7, 1980).

We agree with the district court that a neutral policy would have a secular purpose and would avoid an entanglement with religion. We cannot agree, however, that such a policy would have the primary effect of advancing religion. Rather, it would have the primary effect of advancing the University's admittedly secular purpose—to develop students' "social and cultural awareness as well as [their] intellectual curiosity." It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular. It would no more commit the University, its administration or its faculty to religious goals then they are now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, the Young Democrats or the Women's Union.

Furthermore, a neutral policy would not be an "establishment" as that term was understood by the framers of the First Amendment. "[F]or the men who wrote the Religion Clauses * * * the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission, supra,* 397 U.S. at 668. Under a neutral policy, the University would not sponsor religious worship or teaching; sponsorship would lie with the recognized student groups. Financial support would be minimal. Finally, there would be no active involvement of the sovereign because the University's role would be limited to

determining the time, place and manner of the event and would not extend to approval or disapproval of content.[8]

In contrast with a neutral policy, UMKC's current regulation has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 612-613. The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups.[9]

The University's prohibition on worship and religious teaching also hopelessly entangles it in the delicate tasks of defining religion, determining whether a proposed event involves religious worship or teaching, and then monitoring events to ensure that no prohibited activity takes place. These would be particularly difficult tasks in our contemporary society.[10]

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[8] Student use of University facilities is, of course, subject to such reasonable limitations as to time, place and manner as the University may deem appropriate. *See Healy* v. *James, supra,* 408 U.S. at 192-193. "Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 189.

[9] In an affidavit filed with the district court, a Cornerstone member stated:

> Having to explain that we have to meet off campus tends to make students think that there is something "wrong" with us and that there is something wrong with religion since it has been banished from the campus. * * * This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group.

[10] Our society's broadening definition of religion is reflected in *Torcaso* v. *Watkins,* 367 U.S. 488, 495 & n.11 (1961), where the Court indicated that nontheistic religions, including Buddhism, Taoism, Ethical

The fine line between impermissible governmental aid to religion and the neutral accomodation of religious groups' First Amendment rights was illuminated by Judge Leventhal's scholarly opinion in *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979). In that case, the Court considered a challenge to the scheduled use of the National Mall for the celebration of Mass by Pope John Paul II. Although it was estimated that the Department of Interior would incur expenses in excess of $128,450 for services rendered during the Mass, no impermissible aid to religion was found. Noting that the Free Exercise Clause "compels government to make *some* accomodation to religious realities and needs," it found that "equal access to a public facility generally open to the public," was such an accomodation. *Id.* at 935 (emphasis in original, footnote deleted). It than concluded that "[s]o long as government aid goes not further than arguably required by [the accomodation] principle, there is no violation of the separation required by the Establishment Clause." *Id.* (footnote deleted). *See also Sherbert* v. *Verner*, 374 U.S. 398 (1963).

The University urges us to distinguish *O'Hair* on the ground that a public building rather than a park is involved. We cannot do so. We note initially that the University prohibited Cornerstone from meeting both in its buildings *and* on its grounds. The grounds of a university, no less than the parks of a town, have historically been used by students for the purposes of assembly and communication. Recognizing this, the district court noted that Cornerstone's equal protection argument would have some force if the group was prohibited "from conducting religious services on the grounds, sidewalks, or streets

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Culture and Secular Humanism, were included in the protection afforded by the Free Exercise Clause. Similarly, in *United States* v. *Seeger*, 380 U.S. 163, 166 (1965), the Court indicated that conscientious objector protection would extend to those whose nontheistic beliefs occupy a place in their lives parallel to that filled by an orthodox belief in God of one historically entitled to the exemption. *See also* L. Tribe, American Constitutional Law 826-833 (1978).

of the university * * *." *Chess* v. *Widmar, supra,* 480 F. Supp. at 919. It did not, however, apply this conclusion to the stipulated fact that Cornerstone was denied access to the University grounds. *See* p. 9 & note 3, *supra.* When this fact is considered, *O'Hair's* relevance is clear.

Moreover, even if UMKC's regulation prohibited only use of public buildings, *O'Hair* is still applicable. The important question is not the character of the property but the character of its use; the National Mall and other parkland has acquired its status as an open forum by tradition, the facilities that UMKC offers to its student groups have attained that status through operation of its Student Activities Program. Just as a sidewalk or a park may not be made available for some type of speech but not others, *see Police Dept.* v. *Mosley, supra; O'Hair* v. *Andrus, supra,* so, too, UMKC's facilities may not be made available to all student groups except those seeking to engage in religious worship or teaching.

We further note that a university, like parkland, connotes special First Amendment values. For millions of people, the university is their first and perhaps most important exposure to the free and open marketplace of ideas which is at the core of our First Amendment rights. *See Healy* v. *James, supra,* 408 U.S. at 180-181. In his classic essay, "The Idea of a University," John Henry Newman described the institution as a place

> in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge.

Newman, *The Idea of a University,* in 28 The Harvard Classics 31, 39 (1910).

To attempt to insulate religious issues from this "collision of mind with mind, and knowledge with knowledge" is to deny the importance of religion in our history and culture and to deprecate the role of the university community in the maturation of youth.

The University also suggests that *O'Hair* is distinguishable because it involved a single use, not the regularly recurring use sought by Cornerstone. *See O'Hair* v. *Andrus, supra,* 613 F.2d at 639 (MacKinnon, J., concurring). The University's regulation, however, clearly prohibits any use, single or recurring.

The district court found, and the University asserts on appeal, that this case is controlled by *Tilton* v. *Richardson, supra,* 403 U.S. 672. In *Tilton,* the Court upheld aid in the form of federal grants for the construction of academic facilities at private universities. Some of these universities were church-related. The legislation included a restriction that the buildings not be used for "sectarian instruction or as a place for religious worship * * *." *Id.* at 675. The aid was upheld because its purpose was secular and its primary effect was not the advancement of religion.

The Court did, however, strike that portion of the legislation that terminated after twenty years the restriction on religious use of the facilities.

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

Id. at 683.

The concern of the Court if *Tilton* was with the potential that a sectarian college would be granted exclusive control of a government-financed building on its campus and could devote that building to its own religious purposes. Here, however, there is no question that UMKC continues to control its buildings and devotes them to secular purposes. There is no *Tilton* problem simply because the use of a student forum provided by a university turns, from time to time, to religious activities as well as political, cultural and social ones. The neutral accommodation by a public university of students whose activities are religious is far different than the total dedication of government-funded buildings to a sectarian institution for sectarian purposes.

This case is also distinguishable from those that involved the requested use of classrooms for prayer or Bible study by high school student groups. *See, e.g., Brandon* v. *Board of Educ.*, 487 F. Supp. 1219 (N.D. N.Y. 1980); *Hunt* v. *Board of Educ.*, 321 F. Supp. 1263 (S.D. W.Va. 1971). First, high school students necessarily require more supervision than do young adults of college age and this supervision necessarily poses a greater risk of entangling governmental authority in religious issues. Teachers ordinarily assigned to assist and supervise high school student groups may be thrust into an untenable position when assigned to supervise a prayer group. Even their presence in the room may suggest governmental approval of the religious activities of the group. There is no evidence in the record before us, however, that Cornerstone or any other student group at UMKC receives supervision or assistance from any member of the University's faculty.

Second, we recognize that since university students often rely on their college campus as their total community, they can expect from it a greater accomodation of their religious needs than high school students can from their schools. One commentator has noted that

> the college or university should be viewed as a community, particularly in the case of the resident student who makes of the university his temporary home. Since much of his daily life is rooted in this community, there is greater reason for the public university to make certain specific accommodations of the student's religious interests than there is on the elementary and secondary school levels where the student lives at home. Considerations of both political and free exercise neutrality suggest that University officials should be able to extend official recognition to religious organizations, such as Newman and Hillel clubs, and make available to them campus facilities.

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablisment Principle,* 81 Harv. L. Rev. 513, 583 (1968).

III

CONCLUSION

UMKC has the right, as do all public universities, to recognize student groups that seek to associate for the advancement of any and all ideas. It has exercised this right and has opened certain of its facilities to recognized student groups for lectures, discussions, symposiums, meetings, events and programs. But UMKC has denied access to these facilities to one such recognized student group based solely on its conclusion that the group's meetings include either religious worship or religious teaching. This denial clearly burdens the constitutional rights of the group's members and is not justified by a compelling state interest in avoiding an establishment of religion. A neutral accomodation of the many student groups active at UMKC would not constitute an establishment of religion even though some student groups may use the University's facilities for religious worship or religious teaching. Therefore, UMKC's regulation No. 4.0314.0107, which prohibits religious worship and

religious teaching in the University's buildings or on its grounds, is not required by the Establishment Clause. Because of the burden it imposes on the rights guaranteed to the appellants by the First and Fourteenth Amendments of the federal Constitution, the regulation is invalid.

This matter is remanded to the district court for action consistent with this opinion. Costs will be taxed to the appellees. The appellants may file their request for attorneys' fees on this appeal with this Court within ten days of the issuance of the mandate. The appellees will then have ten days to make a response.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1048
September Term, 1980

Florian Frederick Chess, et al.
Clark Vincent, et al.,
Appellants,

v.

Gary E. Widmar, et al.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

The petition for rehearing en banc is denied. Judges Bright and McMillian would grant the motion and have filed a dissenting statement, copy of which is attached to this order and by reference made a part hereof.

September 19, 1980

BRIGHT and McMILLIAN, Circuit Judges, dissenting.

We dissent from the ruling of the majority denying a rehearing en banc in this case. The case and the important issues it raises deserve the full attention of this court.

The University's petition for a rehearing en banc alleges in part that the panel opinion either misinterpreted or ignored the constitution and laws of the State of Missouri. Article I, § 7 of the Missouri Constitution explicitly requires

> [t]hat no money shall ever be taken from the public treasury, *directly or indirectly,* in aid of any church, sect or denomination of religion * * *. (Emphasis added)

Additionally, Article IX, § 8 clearly states:

> Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation *or pay from any public fund whatever, anything* in aid of any religious creed, church or sectarian purpose * * *. (Emphasis added)

The Missouri courts have long interpreted these provisions to be more restrictive than the first amendment to the United States Constitution in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state. *American United* v. *Rogers,* 538 S.W.2d 711, 720, *cert. denied,* 429 U.S. 1029 (1976); *Paster* v. *Tussey,* 512 S.W.2d 97, 101-02 (Mo. 1974) (en banc), *cert. denied,* 419 U.S. 1111 (1975); *Harfst* v. *Hogen,* 163 S.W.2d 609, 613-14 (Mo. 1947) (en banc).

Significantly, this interpretation has received the approval of the federal judiciary in this circuit. As stated in *Luetkemeyer, et al.* v. *Kaufmann, et al.,* 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd,* 419 U.S. 888 (1974):

> We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a "compelling state interest in the regulation of a subject within the State's constitutional power [.]" * * * That interest, in our judgment, satisfies any possible infringement of the Free Exercise Clause of the First Amendment or of any other prohibition in the Constitution of the United States. * * *
>
> The fact that Missouri has determined to enforce a more strict policy of church and state separation than that re-

> quired by the First Amendment does not present any substantial federal constitutional question. The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter. [*Id.* at 386.]

The panel decision, however, only cryptically refers to the role of state law in this case, and even then only by way of footnote.

> The University also contends that Missouri's long history of strict separation of church and state constitutes a compelling state interest that justifies burdening appellants' First and Fourteenth Amendment rights. *See Luetkemeyer v. Kaufmann,* 364 F. Supp. 376 (W.D. Mo. 973), *aff'd,* 419 U.S. 888 (1974). For the reasons stated in the test, we disagree. Moreover, it is difficult to believe that the University is as concerned with the strict separation of church and state as it here contends. * * * [*Chess, et al.* v. *Widmar, et al.*, No. 80-1048, slip op. at 15 n. 7 (8th Cir. Aug. 4, 1980).]

In our judgment that footnote inadequately addresses this serious and important contention. The test does not respond to the issue, and the panel's rejection of this contention because of the lack of "concern" demonstrated by the University for separation of church and state disregards the real issues—whether the state constitution mandates strict separation of church and state when it comes to use of University buildings for formalized or denominational worship services by a student group, and whether that mandate overrides any infringement of the students' free exercise rights under the United States Constitution.

Moreover, the case raises significant issues under the first amendment religion clauses that we believe ought to be addressed by the full court, particularly because the case appears to be

one of first impression in this ciruict. The brevity of the first amendment and the absolute terms in which it is cast have provided the courts with a continuing source of difficulty in steering a course between the Scylla and Charybdis of the establishment and free exercise clauses.

We entertain considerable doubt that cases which permit expression of political and religious views in public places require that state institutions make its facilities available for denominational religious services.

These troubling questions, in our judgment, warrant a rehearing en banc.

A true copy:

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1048
September Term, 1980

Florian Frederick Chess, Dale Rhoton, Ronald Barnes, Glenn P. Garrison, Kathleen Anne Aguirre, Douglas Neef, Clark Vincent, Appellant,

James S. Colmer, Jr. Dawn Wallace, Jonathan Williams, Appellant,

Malinda Ann McMurry and Katherine Cyman,

v.

Gary E. Widmar, The Board of Curators of the University of Missouri, Barbara Berkmeyer, Daniel L. Brenner, Robert A. Dempster, William T. Doak, C. R. Johnston, Marian Oldham, Wallace R. Stacey, M. D. Rex Z. Williams and Van O. Williams,

Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

On motion of appellees, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of the Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of ceriorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

September 30, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0756-W-2

Florian Frederick Chess, et al.,
Plaintiffs,

v.

Gary E. Widmar, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

This action was filed on October 13, 1977 by eleven students at the University of Missouri-Kansas City (hereinafter university). The eleven students are part of a religious group called Cornerstone, which is an officially recognized student group at the university. The students' complaint alleges that university officials have refused to allow the students involved in Cornerstone to conduct their regular religious services in university-owned buildings. The students contend that the university's refusal to permit their group to use university facilities violates their rights guaranteed by the first and fourteenth amendments to the United States Constitution. On July 18, 1978, the students filed an amended complaint in which they request both a declaratory judgment and injunctive relief.

The parties have filed cross-motions for summary judgment and have stipulated that the following facts are not in dispute.

1. Cornerstone is an officially recognized student organization at the campus of the University of Missouri - Kansas City (UMKC). UMKC is a part of the University of Missouri system which is governed by the Board of Curators of the University of

Missouri, which is an official body established by the state constitution of Missouri for the government of the University and its affairs.

2. The individuals named as plaintiffs were enrolled as students at UMKC at the time this action was commenced and were involved in Cornerstone. Plaintiffs Garrison, Aguirre, Colmer and Cyman are not presently enrolled as students at UMKC. The balance of the named plaintiffs are still presently enrolled at UMKC, and still participate in Cornerstone activities.

3. Under past and current policy of the University of Missouri, one of the benefits afforded recognized student organizations is the privilege of using the student center and certain other facilities of the University as a place in which to meet, subject to certain limitations as to time, place and conduct of the proposed meeting.

4. Each student enrolling at the University of Missouri - Kansas City pays a "Center Activities - Athletic Fee." This fee is $35.00 for all those enrolling for at least ten credit hours of instruction, and is something less for those taking fewer hours of instruction. The proceeds from the "Center Activities - Athletic Fee" go, in part, to fund the operation of the student center (referred to at many schools as a student union).

5. The following regulations are presently in effect at UMKC and throughout all campuses of the University and have been in effect since sometime in 1972:

> 4.0314.0107 No university buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly

referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group.

6. In early January, 1977, pursuant to established University procedures, Cornerstone applied for the privilege of using the University facilities, on a regular basis, for holding Cornerstone meetings.

7. Said application of Cornerstone was rejected on or about February 4, 1977, because the University, after asking for clarification as to the activities to be conducted at the proposed meetings, concluded that the conduct of the proposed meetings would be in violation of regulations 4.0314.0107 and 4.0314.0108. In reaching such conclusions, the University relied primarily on the letter of one of plaintiffs' attorneys, which was written on behalf of Cornerstone to Mr. Gary E. Widmar, Dean of Students, UMKC. The letter states:

Re: Request of Cornerstone for
use of University Facilities

Dear Dean Widmar:

Thank you for meeting with my clients and me on January 20. You will recall that at that time we briefly discussed the request of Cornerstone for the use of university facilities, and I advised you that I would be submitting a legal memorandum supporting our view that the law prohibits the discriminatory banning of religious activities from university property.

Since you mentioned that you had been consulting with Mr. Marvin Wright of the University Counsel's office in regard to this question, I decided that I would address the legal memorandum to Mr. Wright and furnish you with a copy. But I also wish to take this opportunity to respond to your request for more information regarding the nature and purpose of the Cornerstone meetings.

Typical Cornerstone meetings in University facilities usually include the following:

1. The offering of prayer;

2. The singing of hymns in praise and thanksgiving;

3. The public reading of scripture;

4. The sharing of personal views and experiences (in relation to God) by various persons;

5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and

6. An invitation to the interested to meet for a personal discussion.

As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.

Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is not doubt that worship is an important part of the general atmosphere. There also is not doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.

There are no collections or solicitations of funds at these meetings, and there are no specific rituals or practices of any particular denomination or sect.

I assume that the foregoing information will be sufficient. If more is needed, please let me know and we will be happy to provide it for you. In the meantime, I am herewith resubmitting in behalf of Cornerstone the group's request for the use of University facilities.

In view of the recent Delaware decision enclosed with my letter to Mr. Wright, I do not feel the University could be criticized for allowing Cornerstone to continue to meet pending further clarification of the law. And I must point out that it is very important to my clients that they be able to continue to use University facilities, particularly in view of some special meetings planned during mid-February.

Thank you for your consideration.

Very truly yours,

James M. Smart, Jr.

8. As a result of said rejection of the application of Cornerstone to use University facilities, Cornerstone has not been permitted to use the University facilities as a place in which to hold meetings of the type described in their application since the date of the rejection of said application. In addition, Cornerstone has not been permitted to hold small group Bible studies on the University lawn or in other University facilities.

9. Although various religious groups, including Cornerstone, have been permitted to meet in the facilities of the University in the past, neither the Chancellor nor the Dean of Students of the University of Missouri - Kansas City have ever authorized a student organization to utilize a University facitity for a meeting where they had full knowledge that the purposes of the meeting include religious worship or religious teaching.

10. The University has only one physical facility designated as a chapel and it is located on the Columbia campus of the University and was built and paid for totally by private donations and funds.

11. If Florian Frederick Chess were summoned to testify of his personal knowledge as to matters pertinent to the issues of this case, his testimony would be the same as the content of his affidavit dated September 29, 1977, and filed with the Motion for Preliminary Injunction in this case. In that affidavit, Mr. Chess states:

> 1. I am a student at the University of Missouri—Kansas City and I reside at 4914 Grand Avenue, Apartment 12, Kansas City, Missouri 64112. My telephone number is 753-5185.
>
> 2. I am involved in a recognized student group on the UMKC campus called Cornerstone.
>
> 3. For the last year or two we have had at any one time perhaps twenty students who participate actively in Cornerstone and form the backbone of the campus organiza-

tion. There are many other students who come to meetings and get-togethers of our group less frequently, but still on a somewhat regular basis. Students can be involved as much or as little as they desire. We do not have memberships or dues and we have very little formal organization. We have, however, in the past been one of the most, if not the most, active organization on campus.

4. We are a group of people who believe that Christianity is pertinent to everyday life — even the life of a student. We find our Christianity — which we would define as a personal relationship with a resurrected, living Savior — to be relevant to all aspects of our lives. For instance, when we make value decisions as to how we relate to people, whether or not we should be honest in taking examinations, what our attitudes should be towards sex and marriage, how we should respond to our parents and to others in authority, what we should pursue for a career — and in all of such matters, we find that our Christianity has something to say and is therefore intensely practical. We are not a denomination and we are not concerned with religious ritual and religious ceremony, but instead with the practical aspects of how Christianity and the Bible relate to every aspect of our lives.

5. Our purpose as a group is to promote a knowledge and awareness of Jesus Christ on the campus, and also, of course, to encourage one another in the faith and to grow in the grace and knowledge of the Lord Jesus Christ. To carry out these objectives we must meet together, provide a forum for our message, and have a place for interested students to meet with us.

6. We have been meeting regularly on the campus since about 1972 or 1973. We have met at different locations on campus, always with permission. Last year we met regularly at 103 Haig Hall Annex for our Saturday night meetings.

We have had up to one hundred and twenty-five people at the meetings on several occasions, and frequently have had at least one hundred.

7. We also in the past have had some Bible studies on campus with permission. During the 1975 - 1976 year we had a weekly study in Room 34 of the Education Building.

8. The program for our Saturday night meetings on campus consisted of Bible study and teaching, prayer informal sharing, and singing. All are welcome to attend, and, in fact, it is our purpose to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ and the Bible.

9. We have never had nor sought any official promotion or sanction as to our activities or purposes from the university administration, and we expect no more accommodation than that which is afforded other recognized student groups.

10. The prohibition against meeting on campus which began in February, 1977, has had a very significant impact on our meetings, on our attendance, and on our ability to maintain the momentum of our outreach to students and faculty.

11. We have continued to meet, of course, but being off campus has had many unfortunate disadvantages:

a) One disadvantage is a loss of visibility and identity as a campus organization. In a real sense, we are no longer a "campus" organization, and it is difficult to interest other students in any activities which are off campus. Students know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting.

b) Another disadvantage is increased confusion. Even though we have begun meeting in a house located only about a block and a half from the campus, students who are not familiar with where we are meeting are not as likely to go to an unfamiliar address on a residential street (Charlotte Street) as they would be to go to a regularly used and well-known campus building.

c) Another disadvantage is descreased comfort. Interested visitors are not encouraged to return by the crowded and uncomfortable conditions that exist at the meetings on Charlotte Street. Not only is the house severly overcrowded, but the house is so constructed that probably no more than about forty percent of those in attendance can see the person speaking even when the speaker stands in the most observable position.

d) Another disadvantage is lack of convenience and efficiency. It is just not as convenient for students to go off campus as it takes more time out of their schedules.

e) Another disadvantage is the burden that it places upon those who host the meetings. We have been having roughly seventy-five people at our regular off-campus meetings.

f) Another disadvantage is that it makes our message and our purposes seem more remote and less relevant to the typical student. Having to explain that we have to meet off campus tends to make students think that there is something "wrong" with us and that there is something wrong with religion since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete

and has nothing to do with the realities of life. This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group.

g) In addition, and also as a result of the above stated factors, we have experienced a definite decrease in the attendance at our activities. We have continued to promote our activities and have continued our efforts to attract other studnets, but our attendance has been lower since we were forced off campus. We seem to have an average attendance of roughly seventy-five or so at our recent meetings since being forced off campus, and it would be physically impossible for us to accommodate many more than now attend. It would be impossible, for instance, to accommodate the one hundred and twenty-five we used to have at some of our campus meetings on previous occasions when we were permitted to meet on campus.

/s/ Florian Frederick Chess
Florian Frederick Chess

12. If Jonathan Williams were summoned to testify of his own personal knowledge as to matters pertinent to the issues of this case, his testimony would be the same as the content of his affidavit dated September 29, 1977, and filed with the Motion for Preliminary Injunction in this case. In that affidavit Mr. Williams states:

1. I am a student at the University of Missouri—Kansas City and I reside at 5532A Troost, Kansas City, Missouri. My telephone number is 444-6679. I am involved in the Cornerstone organiation.

2. Our group has been prohibited from holding our regular meetings in university buildings since last February.

3. On about August 29, 1977, Tony Hallman, a friend of mine who is also involved in Cornerstone, and I went together to the University Buildings and Grounds office to see if it would be possible to have an informal Bible study for a small group of people (approximately twenty or so) on the lawn on the grounds of the university. We talked with Mr. Hatch, the Chief of Buildings and Grounds.

4. After describing to Mr. Hatch why we had come, Mr. Hatch showed us the university regulation which prohibited the use of the university premises for "religious teaching" and "religious worship." Mr. Hatch then asked what we would do at these meetings, and I told him that we would read our Bibles and talk about things in the Bible. Mr. Hatch advised us that, in his view, the only way that we could be permitted to meet was if we presented all possible views of the Bible fairly, and not talk about just one view of the Bible. Although Mr. Hatch was pleasant and sympathetic, he was firm in his position. Mr. Hatch never inquired about the size of the group, nor did he give any other reason as to why we would not be permitted to meet on the grounds.

5. Since the regulation Mr. Hatch had cited mentioned that we could meet in a chapel if there was one, I inquired about the possibility that a chapel would be built. Mr. Hatch stated that if we wanted a chapel, we would have to "get the ball rolling" ourselves and that it would have to be funded by private donations.

6. Mr. Hatch then referred us to Mr. Claiborne Harper, Business Officer in the university administration, who we went to see that same day. We ended up seeing a Mr. Stan Dalen, Assistant Business Officer, instead. He in turn called Dean Gary Widmar, Dean of Students. Mr. Dalen then said that Dean Widmar suggested that we talk to Dr. Paul Parker, an administrator in charge of "Student Life."

7. We went to see Dr. Parker and explained to him why we had come. Dr. Parker stated that he could not give us permission to meet because of the university's policy about religious meetings, and he stated that he was surprised that Dean Widmar had suggested that we come to see him. He stated that, "until this thing is cleared up, I cannot approve your request."

8. I have also read the affidavit of Florian Frederick Chess dated *Sept. 29, 1977* in regard to the impact of the prohibition on our campus ministry, and I find the things stated therein to be true and correct to the best of my knowledge and belief.

/s/ Jonathan Williams
Jonathan Williams

Plaintiffs' complaint includes allegations that they have been deprived, under color of state law, of rights and privileges guaranteed by the United States Constitution. Those allegations are a sufficient basis for this Court to exercise jurisdiction over plaintiffs' claim. 28 U.S.C. § 1343 (1976). The parties have not addressed the questions whether these plaintiffs have standing to bring this action and whether the action is moot. This Court has however, carefully considered those issues and finds that the action is in a proper posture for decision.

This cause now pends on the parties' cross-motions for summary judgment. After consideration of the parties' stipulations and their suggestions in support of their motions for summary judgment, this Court is convinced that the material facts are not in dispute and that summary judgment is, therefore, appropriate.

The sole university practice challenged in this action is the refusal, by the university, to permit plaintiffs to conduct regular religious services in university-owned buildings. Plaintiffs do not contend that they are treated differently from any other

religious group on campus. Nor do plaintiffs contend that they are limited, in any way, from holding on-campus meetings that do *not* include religious worship services.

Plaintiffs present several arguments in support of their contention that the university's refusal to permit Cornerstone to hold religious worship services in university-owned buildings is constitutionally impermissible. First, plaintiffs argue that the university's policy violates their right to free exercise of their religion as guaranteed by the first and fourteenth amendments. The first amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

U.S. Const. amend. I. Both the establishment clause and the free exercise clause of the first amendment have been made applicable to the States through the fourteenth amendment. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303 (1940). There is no dispute that the actions of the university, for the purposes of this lawsuit, may be treated as actions of the State of Missouri. The university's actions are, thus, subject to the limitations of the first amendment as applied to the States through the fourteenth amendment.

This Court understands plaintiffs' free exercise argument to be that the university's ban on religious services in university-owned buildings infringes their right to practice their religion on the university campus. In response, defendants argue that the university's ban on religious activities in university-owned buildings is required by the establishment clause of the first amendment. Defendants also argue, alternatively, that the State of Missouri's interest in maintaining a strict separation of church and state is a sufficiently compelling interest to justify whatever infringement, if any, of plaintiffs' free exercise rights that may result from the ban on religious activities in university-owned buildings.

The starting point for this Court's analysis is the question whether the university's ban on religious activities in university-owned buildings is required by the establishment clause of the first amendment. That question is not easily answered. As Chief Justice Burger has observed, "candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudicaton." *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971). The Supreme Court has, however, provided some guidance in this difficult area. The Supreme Court's establishment clause cases, taken together, make clear that three factors should be considered in determining whether a certain regulation or practice violates the establishment clause:

> [T]he law in question, first must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion.

Committee for Public Education v. *Nyquist,* 413 U.S. 756, 773 (1973) (citations omitted); *Bogen* v. *Doty,* 598 F.2d 1110, 1113 (8th Cir. 1979). In applying those factors to the facts of this case, this Court finds that the first and third factors do not operate to bar the request for use of the university's buildings. A university policy that permitted *any* student group to meet in university-owned buildings for *any* purpose would aid all student groups, regardless of religious affiliation and would, therefore, reflect a clear secular purpose. In addition, since such a policy would make no distinction between groups or their purposes, entanglement with religion would be completely avoided. The second factor, whether the primary effect either advances or inhibits religion, is, however, not so easily answered. This Court draws guidance from the Supreme Court's analysis of this factor in its establishment clause cases.

The answer to the question of whether a policy that permitted the conduct of religious services in government-owned buildings

would have the effect of advancing religion was first suggested by Justice Brennan in *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963). In his concurring opinion, Justice Brennan stated:

> The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the *temporary* use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood.

374 U.S. at 299 (concurring opinion) (emphasis added). Justice Brennan also noted, however, that "A different problem may be presented with respect to the *regular* use of public school property for religious activities." *Id.* at 298 n. 74 (emphasis added). The outcome suggested by Justice Brennan in *Abington School Dist., supra,* was adopted by the Court seven years later in *Tilton* v. *Richardson,* 403 U.S. 672 (1970) (hereinafter *Tilton*). *Tilton* involved an establishment clause challenge to federal expenditures for classroom facilities at church-related colleges and universities. One question before the Court was whether the United States could subsidize university facilities that might be used for religious instruction, religious training, or worship. The Congressional action challenged in *Tilton* limited the use of the federally-subsidized buildings to secular purposes for the first twenty years after the buildings were completed. After that first twenty years, however, there would exist no enforceable restrictions on the use of the buildings. The Court found the potential for religious use of the federally-subsidized buildings to have the primary effect of advancing religion, and, thus, to violate the establishment clause:

> Under § 754(b)(2), therefore, a recipient institution's obligation not to use the facility for sectarian instruction or religious worship would appear to expire at the end of 20 years. We note, for example, that under § 718(b)(7)(C) (1964 ed., Supp. V), an institution applying for a federal grant is only required to provide assurances that the facility will not be used for sectarian instruction or religious worship "during at least the period of the Federal interest therein (as defined in section 754 of this title)."
>
> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. *If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.*
>
> *To this extent the Act therefore trespasses on the Religion Clauses.* The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value.

Tilton, supra at 683 (emphasis added).

This Court finds the Supreme Court's clear holding in *Tilton* to control the question of whether university-owned buildings may be used for religious purposes. In this case, it is uncontradicted that plaintiffs seek to use state-owned buildings on a regular basis for the conduct of their religious worship services. Thus, the practice that plaintiffs request this Court to force upon the university is identical to the practice that the *Tilton* Court found to have a primary effect of advancing religion.

This Court does not read *Tilton* to apply only to church-related universities. The *Tilton* Court specifically noted that, "these [church-related univeristy] buildings are indistinquishable from a state university facility." *Tilton, supra* at 680.

In *Tilton,* the Court held that if a practice has the primary effect of advancing religion it violates the establishment clause. *Tilton, supra* at 683. In light of *Tilton,* this Court finds that a university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion. This Court holds, therefore, that the university's present ban on religious services in its buildings is required by the establishment clause.

Plaintiffs rely on *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. Supr. 1975) (hereinafter *Keegan),* as support for their contention that UMKC could, without violating the establishment clause, permit plaintiffs to hold regular religious services in university-owned buildings. This Court has carefully considered the Supreme Court of Delaware's opinion in *Keegan* and finds that the outcome in that case is not supported by the controlling law. In *Keegan,* the Supreme Court of Delaware was faced with facts that are indistinguishable from the facts of this case. The plaintiffs in *Keegan* were a group of students who sought permission to hold regular worship services in the commons area of a university-owned dormitory. In defending its refusal to permit the religious services, the University of Delaware argued that to permit the religious services would be a violation of the establishment clause. The Supreme Court of Delaware rejected that argument. Citing *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), and Committee for *Public Education* v. *Nyquist,* 413 U.S. 756 (1973), the Supreme Court of Delaware found, without analysis, that a policy permitting the requested religious services, "would not have an effect that primarily advances religion, would not reflect a sectarian legislative purpose, and would not foster excessive government entanglement with religion." *Keegan, supra* at 16. Citing *Zorach* v. *Clauson,* 343

U.S. 306 (1952), and *Abington School District* v. *Schempp*, 374 U.S. 203 (1953), again without analysis, the *Keegan* Court went on to hold, "To allow religious worship groups the same rights and privileges attendant with the use of the commons room of the dormitory as are accorded other group activities would reflect a lawful accommodation." *Keegan, supra* at 16. Neither *Lemon* v. *Kurtzman, supra,* nor *Committee for Public Education* v. *Nyquist, supra,* stand for the proposition for which they were cited by the Supreme Court of Delaware. *Lemon* v. *Kurtzman, supra,* involved an establishment clause challenge to state aid to church-related elementary and secondary schools. The Supreme Court held that the challenged statutes violated the establishment clause. *Committee for Public Education* v. *Nyquist, supra,* involved an establishment clause challenge to three of the State of New York's programs for assistance to low income school-age children. As in *Lemon* v. *Kurtzman, supra,* the programs were held to be unconstitutional. Neither of those cases stand for the proposition that religious worship services may be conducted in state-owned buildings without violating the establishment clause of the first amendment. Likewise, neither *Zorach* v. *Clauson, supra,* nor *Abington School District* v. *Schempp, supra,* stand for the propositions for which they were cited. *Zorach* v. *Clauson, supra,* involved an establishment clause challenge to a State of New York program that permitted public school students to leave the school buildings, during regular school hours, to attend religious services. In holding that the program did not violate the establishment clause, the Court relied on the fact that no religious services were conducted in the public school buildings. That case must, therefore, be distinguished from this case where the question presented is whether religious services may be held in a state owned building. In *Abington School District* v. *Schempp, supra,* the Court held that a Pennsylvania law that required reading of the Bible in public schools violated the establishment clause. Neither case can be read to hold that religious groups may be accommodated by permitting them to hold their services in a state-owned

building. In addition, the Supreme Court of Delaware failed to discuss *Tilton, supra,* which is the sole Supreme Court opinion where the question of religious use of university buildings has been presented. This Court is convinced that the outcome in *Keegan* cannot be reconciled with the Supreme Court's opinion in *Tilton, supra.* Accordingly, this Court finds the Supreme Court of Delaware's opinion in *Keegan* of no value in deciding the establishment clause question that is before this Court.

Next, plaintiffs take the position that, even if the conduct of their religious services in university-owned buildings would violate the establishment clause, the university's ban on the religious services must still be struck down because it violates plaintiffs' rights to free exercise of their religion. The basis for this position is plaintiffs' argument that the Supreme Court has relegated the establishment clause to a position inferior to that of the free exercise clause. This Court finds that plaintiffs' position on this point is without merit. First, this Court is not convinced that plaintiffs' right to freely exercise their religion is infringed, in any way, by the university's ban on religious activities in university-owned buildings. In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), the Supreme Court made clear that, to invoke the protection of the free exercise clause, the infringed practice must be "one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Wisconsin* v. *Yoder,* 406 U.S. 205, 216 (1972). The facts before this Court simply to not establish that the "practice" of holding religious services in a university-owned building is a matter of deep religious conviction to these plaintiffs. At most, the parties' stipulations support a finding that plaintiffs *prefer* having their religious services in a university-owned building to having the services in a building or home off-campus. In *Wisconsin* v. *Yoder, supra,* the Court specifically held that "matter[s] of personal preference" are not entitled to the protection of the religion clauses. *Wisconsin* v. *Yoder, supra,* at 216.

Second, even if plaintiffs had established that their free exercise rights were somehow infringed by the university's ban on religious services, this Court finds that, as argued by defendants, the State of Missouri's interest in maintaining a strict separation of church and state is a sufficiently compelling interest to overbalance plaintiffs' claims to free exercise of religion. There is no necessity for this Court to retrace Missouri's long history of strict separation of church and state. That history has been held to evidence a compelling interest in maintaining that separation:

> We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a "compelling state interest in the regulation of a subject within the State's constitutional power," within the standard enunciated in NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L. Ed.2d 405 (1963), and applied in *Sherbert*. That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States. We likewise find and conclude that Missouri's interest in that subject is within Missouri's constitutional power and that such interest may properly be described as an "interest of the highest order" within the meaning of *Yoder* and within the meaning of all the other various descriptive terms set forth in United States v. O'Brien above quoted.

Luetkemeyer v. *Kaufman*, 364 F. Supp. 376, 386 (W.D. Mo. 1973), *affirmed* 419 U.S. 888 (1974).

Third, this Court is unconvinced by plaintiffs' argument that the Supreme Court has made the establishment clause subordinate to the free exercise clause. In support of that argument, plaintiffs cite *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and

Wisconsin v. *Yoder,* 406 U.S. 205 (1972). After reviewing those two opinions, this Court disagrees with plaintiffs' reading of those case. In *Sherbert* v. *Verner, supra,* the Court specifically held that State accommodation of the Seventh-Day Adventist's beliefs did *not* violate the establishment clause. *Sherbert* v. *Verner, supra* at 409. The majority opinion in *Sherbert* v. *Verner, supra,* does not even include a discussion of the tension between the establishment clause and the free exercise clause. In *Wisconsin* v. *Yoder, supra,* the majority opinion does include a discussion of the interplay between the religion clauses:

> The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. by preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses.
>
> > "we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed." *Walz* v. *Tax Commission, supra,* at 672.

Wisconsin v. *Yoder, supra* at 220-221. This Court interprets that passage to mean that a mere *danger* of an establishment clause violation cannot serve as a justification for interference with free exercise rights. The Court makes clear that the proper course is one that both avoids infringement of free exercise rights and "avoid[s] any semblance of established religion." *Wisconsin* v. *Yoder, supra* at 221. The two cases relied upon by plaintiffs simply cannot be read to hold that the establishment clause is subordinate to the free exercise clause. The two religion clauses are aimed at separate evils. *Abington School District* v. *Schempp, supra.* The clauses must, therefore, be read together,

with neither clause subordinate to the other. *Walz* v. *Tax Commission,* 397 U.S. 64 (1970). Governmental activity may not exceed the boundaries of either clause. *Wisconsin* v. *Yoder,* 406 U.S. 205, 220 (1971). Since a policy permitting religious services in the university's buildings would violate the establishment clause, plaintiffs' request for this Court to order the university to adopt that policy will be denied.

Plaintiffs make three additional arguments that must be considered. First, plaintiffs argue that the university's regulations act as a prior restraint against religious speech. Plaintiffs do not explain this argument, but this Court feels compelled to address the issues that may be lurking in its shadows. This argument is not unlike the one made by plaintiffs in connection with their free exercise theory. Essentially, they argue that the establishment clause must yield to the freedom of speech clause of the first amendment. This Court is convinced that this argument has been rejected by the Supreme Court.

In *Abington School District* v. *Schempp, supra,* the Court was presented with an establishment clause challenge to daily Bible readings conducted by students and teachers in Pennsylvania's public schools. The Supreme Court upheld a lower court order that enjoined the Bible readings. There exists no doubt that students' and teachers' rights to freedom of speech are protected by the first and fourteenth amendments. *Tinker* v. *Des Moines School District,* 393 U.S. 503, 506 (1969). In *Abington School District* v. *Schempp, supra,* however, the Court did not even discuss the effect of its decision on the students' and teachers' free speech rights. That omission is explained by the Court's distinction between "secular intellectual liberties" and "religious activity." *Abington School District* v. *Schempp, supra* at 219. In short, speech with religious content cannot be treated the same as any other form of speech. To do so would make a nullity of both the establishment clause and the free exercise clause of the first amendment.

Next, plaintiffs argue that the university's policy of making the University Center (student union) available to student groups for all purposes except religious purposes denies plaintiffs equal protection of the laws. In support of that argument, plaintiffs cite *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953) (hereinafter *Fowler*). That case involved a city ordinance that was construed to prohibit a group of Jehovah's Witnesses from conducting religious services in a public park. That case must be distinguished from the one before this Court for two reasons. First, the parties in that case conceded that the ordinance in question had been construed to permit Catholics and Protestants to hold their religious services in the park. Thus, the application of the ordinance to Jehova's Witnesses resulted in discrimination against the Jehova's Witnesses as a religious group. There is, however, absolutely no evidence in this case that other religious groups at the university are treated more favorable than the plaintiffs in this action. Second, the *Fowler* case involved the use of a public park, not a public building. This Court is convinced that, for purposes of the religion clauses, a distinction must be drawn between public parks, sidewalks and streets on the one hand, and public buildings on the other. That distinction was recognized in *Soia* v. *New York,* 334 U.S. 558 (1948). The question before the Court in that case was whether a Jehovah's Witness could be barred from preaching over a loud speaker in a public park. The Court upheld the use of the loud speakers. In dissent, Justice Jackson took the position that the use of the public park for religious services violated the establishment clause of the first amendment. *Soia* v. *New York, supra* at 569-70. Justice Jackson reasoned that the Court's holding in *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), that the use of a public building for religious services violated the establishment clause, controlled the question of use of a public park for religious services. *Soia* v. *New York, supra* at 569-70. The majority of the Court rejected that position:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Soia v. *New York, supra* at 561 n. 2. That view has consistently been upheld by the federal courts. It was most recently applied to permit Pope John Paul II to conduct a public Mass on the Washington Mall in Washington, D.C. *O'Hair* v. *Andrus,* Case Number 79-2170 (D.C. Cir. 1979) (Slip Op. October 5, 1979). Thus, if the university's regulations were being applied to prohibit plaintiffs from conducting religious services on the grounds, sidewalks, or streets of the university, plaintiffs' equal protection argument would have some force. In this case, however, plaintiffs' complaint challenges only the denial of the use of university-owned buildings for religious services. As discussed above, since such use would violate the establishment clause, this Court declines to order the university to permit the use of its buildings for religious services.

Finally, plaintiffs argue that, since the university's regulations could be construed to prohibit activities such as classroom discussion of theology, invocations at university functions, and private discussions between individuals, the regulations must, therefore, be struck down as vague and overbroad. This Court is unconvinced by that argument. First, the university's regulation bars only "religious worship or religious teaching." Those

phrases are virtually identical to the language in the Congressional enactment upheld in *Tilton* v. *Richardson, supra.* Second, plaintiffs candidly admit that the meetings they wish to hold in the university's buildings include regular religious worship services. The university's regulations have been appropriately interpreted to deny the use of university buildings for those services. There is absolutely no suggestion in the parties' pleadings or stipulations that the regulations have ever been used to bar activities protected by the first amendment. More importantly, plaintiffs have failed to present any evidence that the exercise of their first amendment rights have been chilled, in any way, by the existence of the university's regulations. The regulations include no threat of punishment, *Thornhill* v. *Alabama,* 310 U.S. 88, 101-102 (1940), nor, as far as this Court knows, have they ever been applied to activities other than regular religious worship services. On these facts, therefore, this Court finds plaintiffs' vagueness argument to be without merit.

For the reasons set forth above, it is

ORDERED that defendants' motion for summary judgment, filed May 16, 1978, be, and hereby is, granted; and it is

ORDERED that plaintiffs' motion for summary judgment, filed May 26, 1978, be, and hereby is, denied.

/s/ Wiliam R. Collinson
District Judge

Dated: December 11, 1979.

Office-Supreme Court, U.S.
FILED
APR 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, *et al.*,
Petitioners,

v.

CLARK VINCENT, *et al.*,
Respondents.

On Writ of Certiorari to the Eighth Circuit Court of Appeals of the United States

JOINT APPENDIX

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JOINT APPENDIX

RELEVANT DOCKET ENTRIES
of the United States District Court
for the Western District of Missouri

Date	
1977	
October 13	Complaint Filed
October 13	Motion for Preliminary Injunction Together with Suggestions in Support Thereof Filed.
November 03	Answer Filed

1978	
April 13	Stipulation of Fact Filed
April 27	Order on Pretrial Conference
June 01	Supplemental Stipulation of Fact Filed
July 18	First Amended Complaint Filed
July 31	Answer to First Amended Complaint Filed
1979	
December 11	Memorandum Opinion and Orders Filed
1980	
January 07	Notice of Appeal Filed
January 09	Appeal Bond Filed
January 22	Designation of Record and Statement of Issues on Appeal Filed

RELEVANT DOCKET ENTRIES
of the Eighth Circuit Court of Appeals

Date	
1980	
January 14	Appeal Docketed
May 21	Argued and Submitted Judges Heaney, Gibson & Stephenson
August 4	Opinion and Judgment Entered on Opinion
August 13	Petition for Re-Hearing En Banc Filed

September 02	Appellants' Motion for Preliminary Injunction or in the Alternative for Immediate Issuance of the Mandate, with suggestions in support of Filed.
September 10	Appellants' Motion to Withdraw Motion for Preliminary Injunction or in the Alternative for Immediate Issuance of the Mandate Filed.
September 17	Appellants' Motion to Withdraw Motion for Preliminary Injunction or Immediate Issuance of Mandate Granted.
September 19	Order Denying Appellees' Petition for Rehearing En Banc with Dissenting Opinion Entered
September 22	Appellees' Motion for Stay of Mandate Filed
September 30	Order Staying Issuance of Mandate Pending Certiorari Proceedings Entered
1981	
February 25	Order of Supreme Court dated February 23, 1981 granting Certiorari Entered

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FLORIAN FREDERICK CHESS,
Kansas City, Missouri,

DALE RHOTON,
Kansas City, Missouri,

RONALD BARNES,
Kansas City, Missouri,

GLENN P. GARRISON,
Kansas City, Missouri,

KATHLEEN ANNE AGUIRRE,
Kansas City, Missouri,

DOUGLAS NEEF,
Kansas City, Missouri,

CLARK VINCENT
Kansas City, Missouri,

JAMES S. COLMER, JR.
Kansas City, Missouri,

DAWN B. WALLACE,
Kansas City, Missouri,

JOHATHAN WILLIAMS,
Kansas City, Missouri,

MALINDA ANN MCMURRY
Kansas City, Missouri,

and

KATHERINE CYMAN,
Kansas City, Missouri,

Plaintiffs,

No. 77-0756CV2

vs.

GARY E. WIDMAR, Dean of
Students, University of
Missouri—Kansas City,

THE BOARD OF CURATORS OF
THE UNIVERSITY OF MISSOURI,

BARBARA BERKMEYER
15278 Spring Run
Chesterfield, Missouri,

DANIEL L. BRENNER
1005 Grand Avenue
Kansas City, Missouri,

ROBERT A. DEMPSTER
226 N. Kingshighway
Sikeston, Missouri,

WILLIAM T. DOAK
Route #2
Vandalia, Missouri,

C. R. JOHNSTON
1616 Missouri Boulevard
Jefferson City, Missouri,

MARIAN OLDHAM
5227 Westminister Place
St. Louis, Missouri,

WALLACE R. STACEY, M.D.
3407 Shady Bend Drive
Independence, Missouri,

REX Z. WILLIAMS
504 E. 5th Street
Rolla, Missouri,

and

VAN O. WILLIAMS
The National Bank
320 Armour Road
North Kansas City, Missouri,
Defendants,

COMPLAINT

Comes now plaintiffs herein and for their complaint against defendants state as follows:

1. This action is brought pursuant to Title 28, United States Code, Section 2201, and Title 42, United States Code, Section 1983, for the purpose of having declared and adjudged unconstitutional, and to enjoin the enforcement of, certain regulations of the University of Missouri promulgated by the Board of Curators, to-wit: the regulations numbered 4.0314.0107 and 4.0314.0108, which prohibit the use of university facilities by students for purposes of either "religious teaching" or "religious worship." A copy of the exact language of these regulations is attached hereto as Exhibit A and made a part hereof by reference.

2. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1343 (3), this being a suit in equity which is authorized by law, Title 42, United States Code, Section 1983, to be brought to redress the deprivation under color of state law of rights, privileges, and immunities secured by the Constitution and laws of the United States. The rights here sought to be redressed are rights guaranteed by the Free Exercise and the Freedom of Expression Clauses of the First Amendment, and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to the Constitution of the United States, as hereinafter more fully appears.

3. Venue is proper in this judicial district pursuant to the provisions of Title 28, United States Code, Section 1391(b) in that this is a civil action wherein jurisdiction is not founded solely on diversity of citizenship; the claim arose in this judicial district; and defendant Dean Widmar resides, and defendant members of the Board of Curators maintain their office, in this district.

4. The plaintiffs are individual students enrolled at the University of Missouri—Kansas City (hereafter "UMKC") involved in a recognized student organization by the name of Cornerstone. Plaintiffs, as a group, seek enforcement of the right to use university facilities as a place in which to hold meetings for the religious purposes of the group.

5. Defendant Gary E. Widmar is the Dean of Students at UMKC, his office being located in Scofield Hall near 5100 Rockhill Road, Kansas City, Missouri.

6. The defendant Board of Curators is an official body established by the State of Missouri for the government of the University and its affairs. The office of the Board of Curators is located in Columbia, Missouri. Service of process upon the defendant Board of Curators may be obtained by serving a copy of the summons and petition upon the President of the Board of Curators, to-wit: Mr. Van Williams, President, National Bank in North Kansas City, 320 Armour Road, North Kansas City, Missouri.

7. Defendants Berkmeyer, Brenner, Dempster, Doak, Johnston, Oldham, Stacey, Williams, and Williams are individual members of the Board of Curators, duly constituted pursuant to law.

8. Although student religious groups had been using the facilities of the University of Missouri, including the Student Union facilities, as a meeting place for meetings which included religious discussion, teaching, and prayer, for many years, the Board of Curators, acting under color of state law, promulgated the regulations set out in Exhibit A in 1972.

9. On or about January 5, 1977, the students involved in Cornerstone submitted a Request for Use of University Facilities (UMKC Form No. 740) pursuant to established procedures of the University, requesting the use of facilities for their meetings during the semester. The facilities were desired as a place in which to hold meetings which usually include prayer and discussion of religious topics. The group had obtained permission to use such facilities, and had used them in this manner, in the past. In February, Cornerstone was advised, through the University Counsel's Office and defendant Dean Widmar, that such meetings could not be permitted in view of the fact that worship was "an important part of the general atmosphere of the meetings" and that such meetings would be in violation of university regulations.

10. The provisions of the said regulations pursuant to which the University has acted in denying the use of facilities to the plaintiffs are in violation of the Constitution and laws of the United States in the following respects:

A. The regulations place an impermissible and undue burden on the free exercise of religion and on freedom of expression in violation of the First Amendment of the Constitution of the United States, as applied to the states through the Fourteenth Amendment, in that they fail to make a reasonable accommodation of the religious needs of the students by forcing the students to hold such meetings away from the grounds of the University. This, in effect, destroys any benefit derived by Cornerstone from being a recognized student organization, and thereby effectively nullifies the official recognition of the organization, and makes it extremely difficult for students interested in these activities to meet as a group.

B. The regulations in question constitute, under the circumstances here present, active hostility against and unlawful discrimination against religion, and an undue burden on freedom of expression in violation of the First

Amendment, as applied to the states through the Fourteenth Amendment to the Constitution of the United States, in that these regulations single out religious expression from among all other types of expression, and exclude such religious expression from the grounds of the University, while permitting students to gather for purposes of other types of expression. Such discrimination is unlawful in that there is no valid and compelling state interest being protected by the University in excluding such religious expression from the grounds of the University.

C. The regulations violate the freedom of expression provision of the First Amendment, as applied to the states through the Fourteenth Amendment, in that the enforcement of the regulations will tend to lead to unlawful censorship of the meetings of religious groups by the University in violation of the First and Fourteenth Amendments. Such censorship would tend to be employed by the University in the instances where the University seeks to determine whether or not elements of the "religious teaching" or "religious worship" are present at such meetings.

D. The regulations in question are impermissibly and unconstitutionally vague and overbroad in violation of the Fourteenth Amendment to the Constitution of the United States in the following particulars:

1. The regulations do not define "religious teaching," nor do they make clear when religious subjects may be discussed and when they may not; and

2. The regulations do not define "religious worship" not do they explain why prayer, which is generally considered one form of "worship" is permitted, but "an atmosphere of worship" such as that occurring at the meetings of Cornerstone, is not permitted.

3. The language goes so far as to preclude a group from holding a meeting where worship is "an important part of the general atmosphere" even though the meeting is not essentially a "worship meeting"; and

4. The ban against "religious teaching" goes so far as to preclude the discussion of religion as it bears on such subjects as the origin of man, the nature of man, and the future of man, which subjects are an integral part of the questions which students, in the academic atmosphere of the University, are entitled to discuss, pursue, and even to attempt to persuade others to their point of view; and

5. The regulations go beyond the requirements of the Missouri Constitution related to separation of church and state, as well as beyond the requirements of the Establishment Clause of the First Amendment of the Constitution of the United States, in that these regulations go beyond dealing with state establishment of, aid to, and undue entanglement with, religion; and instead these regulations deal with the question of what private individuals may discuss and do among themselves, without the question of state aid of sponsorship being involved. Indeed, the language of the regulations as applied in this instance, even go so far as to preclude a particular mental attitude (an attitude of worship) from the grounds of the University.

E. The regulations in question are unduly arbitary and capricious and therefore deny plaintiffs' equal protection of the law and deprive plaintiffs of liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that while it extends to student groups the right to use any chapels on the grounds of the University for religious purposes (although on an irregular and limited basis), the University has failed,

at the UMKC campus, to provide or designate any such chapel. Further, even if there were such a chapel on the grounds at UMKC, the relegation of religious teaching and religious worship to a chapel, as opposed to allowing these matters the same treatment as other types of expression, constitutes an unlawful discrimination against and an impermissible attitude of hostility against religion in violation of the First Amendment, as applied to the states through the Fourteenth Amendment of the Constitution of the United States, in that it classifies religion as something which, in the generally open academic atmosphere of a university, must be confined only to chapels.

F. In addition to unlawfully interfering with the free exercise of religion, the regulations in question also violate the establishment provision of the First Amendment to the Constitution of the United States, as applied to the states through the Fourteenth Amendment, in that the heavy-handed banning from the campus of all those matters traditionally considered "religious" through the enforcement of these regulations has the effect on the campus of establishing and promoting a religion of secularism.

11. Defendant Board of Curators, by promulgating the said regulations under color of law, and the defendant Gary Widmar, by engaging in the enforcement, execution, and administration of the provisions of said regulations under color of law, have deprived and will continue to deprive, unless restrained, the plaintiffs and others similarly situated of their rights to freedom of expression and freedom of religion under the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States.

12. The damage and injury done to the plaintiffs by reason of being deprived of the foregoing rights is continuing and irreparable, and there is no adequate remedy at law. Any other

remedy to which plaintiffs could be referred would be attended by such uncertainties and delays as to deny substantial relief, cause further irreparable injury, and occasion damage, vexation, and inconvenience to the plaintiffs.

WHEREFORE, plaintiffs pray that this Court:

1. Issue a preliminary injunction directing the defendant Dean Gary E. Widmar to immediately approve the application of Cornerstone for the use of University facilities, and to give notification of such to Cornerstone through the undersigned attorney for plaintiffs, and further directing Defendant Board of Curators of the University of Missouri, Dean Gary E. Widmar, and all other agents, officials, and employees of the University of Missouri from enforcing, executing, administering, or in any manner giving effect to said regulations; and

2. Adjudge and declare said regulations to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and therefore unconstitutional and void; and

3. Issue a permanent injunction restraining the Board of Curators and all officials, and agents, and employees of the University from enforcing, executing, administering or in any manner giving effect to said regulations; and

4. Grant plaintiffs the costs of this action, including reasonable attorneys fees, pursuant to Title 42, United States Code, Section 1988, and such order and further relief as may be just and equitable in the premises.

/s/ James M. Smart, Jr.
Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
842-4280

/s/ William H. Pickett
Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
471-4881

Attorneys for Plaintiffs

AFFIDAVIT

Comes now Florian Frederick Chess, of lawful age, one of the plaintiffs named herein, who, having been first duly sworn, deposes and upon his oath states that he has read the foregoing complaint and that the facts stated therein are true and correct to the best of his knowledge and belief.

/s/ Florian Frederick Chess

(Jurat omitted in printing)

Exhibit A

.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious learning by either student or non-student groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Con-

stitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title omitted in printing)

MOTION FOR PRELIMINARY INJUNCTION TOGETHER WITH SUGGESTIONS IN SUPPORT THEREOF

Come now plaintiffs in the above cause, and, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, move the court for a preliminary injunction directing Defendant Dean Gary E. Widmar to approve the request of Cornerstone for the use of university facilities for the purpose of holding meetings in such facilities and further restraining Defendant Dean Widmar and the defendant members of the Board of Curators and the officers, agents, and employees of the University of Missouri from enforcing, executing, administering or in any manner giving effect to said regulations.

Plaintiffs further request the court fix a date for a hearing on this motion and to order defendants to show cause on that date why such a preliminary injunction should not be granted, and to fix the form and extent of the notice of such hearing to be given the defendants, and for all such other and proper relief as may seem to the court right and proper.

The suggestions in support of this motion are as follows:

1. Defendant Board of Curators, acting under color of state law, have enacted regulations which, as enforced, have, since February, 1977, denied plaintiffs their rights to freedom of expression and their rights to the free exercise of their religion under the First Amendment, as applied to the states through the Fourteenth Amendment, and have further deprived plaintiffs of the equal protection of the laws, and of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

2. Unless restrained, defendant members of the Board of Curators and Dean Widmar will continue to deprive plaintiffs of their rights as aforesaid.

3. Immediate and irreparable injury and loss will result to the plaintiffs by reason of the action of the defendants, as more particularly appears in the verified complaint filed herein and the attached affidavits of Jonathan Williams and Florian Frederick Chess. The plaintiffs have no adequate remedy at law.

4. If this preliminary injunction be granted, the injury, if any, to defendants herein, if final judgment be in their favor, will be inconsiderable and will not involve pecuniary loss or damage to defendants.

/s/ James M. Smart, Jr.
1006 Grand Avenue
Suite 1134
Kansas City, Missouri 64106
(816) 842-4280

/s/ William H. Pickett
Pickett & Midkiff
Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
(816) 471-4881

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

AFFIDAVIT OF FLORIAN FREDERICK CHESS

Comes now Florian Frederick Chess, of lawful age, who, having been first duly sworn, deposes and upon his oath states as follows:

1. I am a student at the University of Missouri—Kansas City and I reside at 4914 Grand Avenue, Apartment 12, Kansas City, Missouri 64112. My telephone number is 753-5185.

2. I am involved in a recognized student group on the UMKC campus called Cornerstone.

3. For the last year or two we have had at any one time perhaps twenty students who participate actively in Cornerstone and form the backbone of the campus organization. There are many other students who come to meetings and get-togethers of our group less frequently, but still on a somewhat regular basis.

Students can be involved as much or as little as they desire. We do not have memberships or dues and we have very little formal organization. We have, however, in the past been one of the most, if not the most, active organization on campus.

4. We are a group of people who believe that Christianity is pertinent to everyday life—even the life of a student. We find our Christianity—which we would define as a personal relationship with a resurrected, living Savior—to be relevant to all aspects of our lives. For instance, when we make value decisions as to how we relate to people, whether or not we should be honest in taking examinations, what our attitudes should be towards sex and marriage, how we should respond to our parents and to others in authority, what we should pursue for a career—and in all of such matters, we find that our Christianity has something to say and is therefore intensely practical. We are not a denomination and we are not concerned with religious ritual and religious ceremony, but instead with the practical aspects of how Christianity and the Bible relate to every aspect of our lives.

5. Our purpose as a group is to promote a knowledge and awareness of Jesus Christ on the campus, and also, of course, to encourage one another in the faith and to grow in the grace and knowledge of the Lord Jesus Christ. To carry out these objectives we must meet together, provide a forum for our message, and have a place for interested students to meet with us.

6. We have been meeting regularly on the campus since about 1972 or 1973. We have met at different locations on campus, always with permission. Last year we met regularly at 103 Haig Hall Annex for our Saturday night meetings. We have had up to one hundred and twenty-five people at the meetings on several occasions, and frequently have had at least one hundred.

7. We also in the past have had some Bible studies on campus with permission. During the 1975 -1976 year we had a weekly study in Room 34 of the Education Building.

8. The program for our Saturday night meetings on campus consisted of Bible study and teaching, prayer, informal sharing, and singing. All are welcome to attend, and, in fact, it is our purpose to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ and the Bible.

9. We have never had nor sought any official promotion or sanction as to our activities or purposes from the university administration, and we expect no more accommodation than that which is afforded other recognized student groups.

10. The prohibition against meeting on campus which began in February, 1977, has had a very significant impact on our meetings, on our attendance, and on our ability to maintain the momentum of our outreach to students and faculty.

11. We have continued to meet, of course, but being off campus has had many unfortunate disadvantages:

a) One disadvantage is a loss of visibility and identity as a campus organization. In a real sense, we are no longer a "campus" organization, and it is difficult to interest other students in any activities which are off campus. Students know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting.

b) Another disadvantage is increased confusion. Even though we have begun meeting in a house located only about a block and a half from the campus, students who are not familiar with where we are meeting are not as likely to go to an unfamiliar address on a residential street (Charlotte Street) as they would be to go to a regularly used and well-known campus building.

c) Another disadvantage is decreased comfort. Interested visitors are not encouraged to return by the crowded and uncomfortable conditions that exist at the meetings

on Charlotte Street. Not only is the house severely overcrowded, but the house is so constructed that probably no more than about forty percent of those in attendance can see the person speaking even when the speaker stands in the most observable position.

d) Another disadvantage is lack of convenience and efficiency. It is just not as convenient for students to go off campus as it takes more time out of their schedules.

e) Another disadvantage is the burden that it places upon those who host the meetings. We have been having roughly seventy-five people at our regular off-campus meetings.

f) Another disadvantage is that it makes our message and our purposes seem more remote and less relevant to the typical student. Having to explain that we have to meet off campus tends to make students think that there is something "wrong" with us and that there is something wrong with religion since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group.

g) In addition, and also as a result of the above stated factors, we have experienced a definite decrease in the attendance at our activities. We have continued to promote our activities and have continued our efforts to attract other students, but our attendance has been lower since we were forced off campus. We seem to have an average attendance of roughly seventy-five or so at our recent meetings since being forced off campus, and it would be physically impossible for us to accommodate many more than now attend. It would be impossible, for instance, to accommodate the one hundred and twenty-five we used to

have at some of our campus meetings on previous occasions when we were permitted to meet on campus.

/s/ Florian Frederick Chess

STATE OF MISSOURI)
COUNTY OF JACKSON) ss.

On this 29th day of September, 1977, before me, the undersigned notary public, personally appeared Florian Frederick Chess known to me, and, being first duly sworn, acknowledged that the signature to the foregoing document was his genuine signature and that he signed said document as his free act and deed.

/s/ James M. Smart, Jr.
Notary Public

My commission expires:
9/21/80

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title omitted in printing)

AFFIDAVIT OF JONATHAN WILLIAMS

Comes now Jonathan Williams, of lawful age, who, having been first duly sworn, deposes and upon his oath states as follows:

1. I am a student at the University of Missouri—Kansas City and I reside at 5532A Troost, Kansas City, Missouri. My telephone number is 444-6679. I am involved in the Cornerstone organization.

2. Our group has been prohibited from holding our regular meetings in university buildings since last February.

3. On about August 29, 1977, Tony Hallman, a friend of mine who is also involved in Cornerstone, and I went together to the University Buildings and Grounds office to see if it would be possible to have an informal Bible study for a small group of people (approximately twenty or so) on the lawn on the grounds of the university. We talked with a Mr. Hatch, the Chief of Buildings and Grounds.

4. After describing to Mr. Hatch why we had come, Mr. Hatch showed us the university regulation which prohibited the use of the university premises for "religious teaching" and "religious worship." Mr. Hatch then asked what we would do at these meetings, and I told him that we would read our Bibles and talk about things in the Bible. Mr. Hatch advised us that, in his view, the only way that we could be permitted to meet was if we presented all possible views of the Bible fairly, and not talk about just one view of the Bible. Although Mr. Hatch was pleasant and sympathetic, he was firm in his position. Mr. Hatch never inquired about the size of the group, nor did he give any other reason as to why we would not be permitted to meet on the grounds.

5. Since the regulation Mr. Hatch had cited mentioned that we could meet in a chapel if there were one, I inquired about the possibility that a chapel could be built. Mr. Hatch stated that if we wanted a chapel, we would have to "get the ball rolling" ourselves and that it would have to be funded by private donations.

6. Mr. Hatch then referred us to Mr. Clairborne Harper, Business Officer in the university administration, who we went to see that same day. We ended up seeing a Mr. Stan Dalen, Assistant Business Officer, instead. He in turn called Dean Gary Widmar, Dean of Students. Mr. Dalen then said that Dean Widmar suggested that we talk to Dr. Paul Parker, an administrator in charge of "Student Life."

7. We went to see Dr. Parker and explained to him why we had come. Dr. Parker stated that he could not give us permission to meet because of the university's policy about religious meetings, and he stated that he was surprised that Dean Widmar had suggested that we come to see him. He stated that, "until this thing is cleared up, I cannot approve your request."

8. I have also read the affidavit of Florian Frederick Chess dated Sept. 29, 1977 in regard to the impact of the prohibition on our campus ministry, and I find the things stated therein to be true and correct to the best of my knowledge and belief.

/s/ Jonathan Williams

STATE OF MISSOURI)
COUNTY OF JACKSON)

On this 29th day of September, 1977, before me, the undersigned notary public, personally appeared Jonathan Williams known to me, and, being first duly sworn, acknowledged that the signature to the foregoing document was his genuine signature and that he signed said document as his free act and deed.

/s/ James M. Smart, Jr.
Notary Public

My commission expires:
9/21/80

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title omitted in printing)

MOTION FOR CONSOLIDATION OF HEARING ON PRELIMINARY INJUNCTION WITH TRIAL ON MERITS, WITH SUGGESTIONS IN SUPPORT THEREOF

Come now plaintiffs herein and move the court for an order that the trial on the merits in this cause be advanced and consolidated with the hearing on plaintiffs' Motion for a Preliminary Injunction.

In support of this motion, plaintiffs state as follows:

1. A substantial part of the evidence offered on plaintiffs' said Motion for Preliminary Injunction will be relevant to the merits and will be presented in such form as to qualify for admission at the trial proper.

2. In addition, this is a case in which it is anticipated that the evidence as to the facts will not be contested as it appears that there will be no genuine issue as to any material facts. The matter may, in fact, perhaps be submitted to the Court by way of stipulation. Therefore, plaintiffs submit that consolidation of the proceedings will tend to expedite the final disposition of the action.

/s/ James M. Smart, Jr.
Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 842-4280

/s/ William H. Pickett
Pickett & Midkiff
Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
(816) 471-4881

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title omitted in printing)

ANSWER TO COMPLAINT

Come now the Defendants herein and for answer to Plaintiffs' Complaint state that the Defendants and each of them:

1. Deny the allegations of paragraph 1 except that Defendants admit that Exhibit A to Complaint is a true copy of regulations adopted by the Board of Curators of the University of Missouri and that such regulations are in effect at this time.

2. Deny the allegations of paragraph 2.

3. Admit the allegations of paragraph 3.

4. Admit that the individual Plaintiffs are enrolled as students at the University of Missouri - Kansas City, but are without knowledge or information as to the other allegations contained in paragraph 4, and therefore deny such other allegations.

5. Admit the allegations of paragraph 5.

6. Admit that Defendant Board of Curators is an official body established by the State of Missouri for the government of the University of Missouri and that the office of the Board of Curators is located in Columbia, Missouri. The Defendants deny the other allegations contained in paragraph 6.

7. Admit the allegations of paragraph 7.

8. Deny the allegations contained in paragraph 8.

9. Admit that a request was received for the use of University facilities in early 1977 by or on behalf of a group known as Cornerstone and admit that such request was denied on the grounds

that the proposed use for religious purposes was in violation of the regulations of the University. Defendants deny the other allegations contained in paragraph 9.

10. Deny all allegations contained in paragraph 10.

11. Deny all allegations contained in paragraph 11.

12. Deny all allegations contained in paragraph 12.

13. Deny all allegations of Plaintiffs' Complaint not herein specifically admitted.

WHEREFORE, having fully answered, Defendants pray to be dismissed hence with their costs and reasonable attorney fees and for such other and further relief as to the Court shall seem meet and proper.

Respectfully submitted,

/s/ Jackson A. Wright
Marvin E. Wright
James S. Newberry
Ted D. Ayres
227 University Hall
Columbia, Missouri 65201

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title omitted in printing)

STIPULATION OF FACT

Come now the parties herein by and through their respective attorneys, and, for the purpose of expediting the handling of this matter hereby stipulate and agree as follows:

1. Cornerstone is an officially recognized student organization at the campus of the University of Missouri - Kansas City (UMKC). UMKC is a part of the University of Missouri system which is governed by the Board of Curators of the University of Missouri, which is an official body established by the state constitution of Missouri for the government of the University and its affairs.

2. The individuals named as Plaintiffs were enrolled as students at UMKC at the time this action was commenced and were involved in Cornerstone. Plaintiffs Garrison, Aguirre, Colmer and Cyman are not presently enrolled as students at UMKC.

3. Under past and current policy of the University of Missouri, one of the benefits afforded recognized student organizations is the privilege of using the student center and certain other facilities of the University as a place in which to meet, subject to certain limitations as to time, place and conduct of the proposed meeting.

4. Each student enrolling at the University of Missouri - Kansas City pays a "Center Activities - Athletic Fee." This fee is $35.00 for all those enrolling for at least ten credit hours of instruction, and is something less for those taking fewer hours of instruction. The proceeds from the "Center Activities - Athletic Fee" go, in part, to fund the operation of the student center (referred to at many schools as a student union).

5. The regulations shown on the attached Exhibit A are presently in effect at UMKC and throughout all campuses of the University and have been in effect since sometime in 1972.

6. In early January, 1977, pursuant to established University procedures, Cornerstone applied for the privilege of using the University facilities for meetings by submitting through designated channels the document which is marked Exhibit B and attached hereto.

7. Said application of Cornerstone was rejected on or about February 4, 1977, because the University, after asking for clarification as to the activities to be conducted at the proposed meetings, concluded that the conduct of the proposed meetings would be in violation of said regulations (Exhibit A). In reaching such conclusions, the University relied primarily on the letter of one of Plaintiffs' attorneys as to the activities normally to be conducted at such meetings. A copy of the letter is attached hereto as Exhibit C.

8. As a result of said rejection of the application of Cornerstone to use University facilities, Cornerstone has not been permitted to use the University facilities as a place in which to hold meetings of the type described in Exhibit C since the date of the rejection of said application. In addition, Cornerstone has not been permitted to hold small group Bible studies on the University lawn or in other University facilities.

9. Although various religious groups, including Cornerstone, have been permitted to meet in the facilities of the University in the past, neither the Chancellor nor the Dean of Students of the University of Missouri - Kansas City have ever authorized a student organization to utilize a University facility for a meeting where they had full knowledge that the purposes of the meeting include religious worship or religious teaching.

10. The University has only one physical facility designated as a chapel and it is located on the Columbia campus of the University and was built and paid for totally by private donations and funds.

11. If Florian Frederick Chess were summoned to testify of his personal knowledge as to matters pertinent to the issues of this case, his testimony would be the same as the content of his affidavit dated September 29, 1977, and filed with the Motion for Preliminary Injunction in this case.

12. If Jonathan Williams were summoned to testify of his own personal knowledge as to matters pertinent to the issues of this case, his testimony would be the same as the content of his affidavit dated September 29, 1977, and filed with the Motion for Preliminary Injunction in this case.

IN WITNESS WHEREOF, the undersigned attorneys have hereunto set their hands this 13th day of April, 1978.

/s/ Marvin E. Wright
For: Jackson A. Wright
Marvin E. Wright
James S Newberry
Ted D. Ayres
227 University Hall
Columbia, Missouri 65201

/s/ James M. Smart
For: James M. Smart, Jr.
1134 Home Savings Bldg.
1006 Grand Avenue
Kansas City, Missouri 64106

and

William H. Pickett
Pickett & Midkiff
Trapers Bank Bldg.
1125 Grand Avenue
Kansas City, Missouri 64106

Attorneys for Defendants

Attorneys for Plaintiffs

Exhibit A

.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group.

Exhibit B

REQUEST FOR USE OF UNIVERSITY FACILITIES
UNIVERSITY OF MISSOURI-KANSAS CITY

Name of Organization:
Cornerstone

Address:
5306 Charlotte

Authorized Representative:
Ron Barnes

Phone:
363-2619

Purpose of Organization:
Promote A Knowledge of Jesus Christ among Students

Name and Purpose of Event:
Saturday Night Mtg. - Educate Members

Name(s) of Speakers:
Bob Bury, Clint Hall

Name of Moderator:

Topic of Speakers:
Various Topics Relating to Christianity & the Bible

Facility Requested (Bldg.& Rm.):
Haag Hall Annex 103&113

Inclusive Dates:
1-15-77—5-77

Time Needed:
7:00—9:30 P.M.

Est. Attendance:
200

If sponsored or invited by Instructional or Admin. Unit of University, Give Name of Unit.

Unit Name:

Event will be Open to:
☐ Organization Only ☐ Students Only ☐Faculty & Staff Only
☒ General Public ☐ Other (Describe):

Will you Charge Admission?
☐ Yes ☒ No

Will Donations be Solicited?
☐ Yes ☒ No

Does the Organization Derive Financial Profit or Declare Dividends?
☐ Yes ☒ No

Applicant Signature:
/s/ Ron Barnes

UNIVERSITY AND STUDENT ORGANIZATIONS ONLY

Are University Funds to be Used?
☐ Yes ☒ No

If so, Give Account Name and Number:

Estimated Total Cost:

Amount of Speaker Fees:

OFFICIAL USE ONLY

Recognized Student Organization?
☐ Yes ☐ No

Normal Activities?
☐ Yes ☐ No

Non-Student Group-Sponsored or Invited?
☐ Yes ☐ No

Staff or Faculty Group Only?
☐ Yes ☐ No

Other Group (Describe):

Service Fee:

Use Fee:

No Fee (Comment on Exclusion): ☐

Building & Room Assigned:

Use Fee Contract Required?
☐ Yes ☐ No

Date of Contract:

COMMENTS:

Approved: (Sponsoring Unit)

Approved: (Student Activities)

Approved:

Approved:

Exhibit C

JAMES M. SMART, JR.
Attorney at Law
Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106

Area Code 816
842-4280

February 1, 1977

Mr. Gary E. Widmar
Dean of Students
University of Missouri - Kansas City
Kansas City, Missouri 64110

Re: Request of Cornerstone for
use of University Facilities

Dear Dean Widmar:

Thank you for meeting with my clients and me on January 20. You will recall that at that time we briefly discussed the request of Cornerstone for the use of university facilities, and I advised you that I would be submitting a legal memorandum supporting our view that the law prohibits the discriminatory banning of religious activities from university property.

Since you mentioned that you had been consulting with Mr. Marvin Wright of the University Counsel's office in regard to this question, I decided that I would address the legal memorandum to Mr. Wright and furnish you with a copy. But I also wish to take this opportunity to respond to your request for more information regarding the nature and purpose of the Cornerstone meetings.

Typical Cornerstone meetings in University facilities usually include the following:

1. The offering of prayer;
2. The singing of hymns in praise and thanksgiving;
3. The public reading of scripture;
4. The sharing of personal views and experiences (in relation to God) by various persons;
5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and
6. An invitation to the interested to meet for a personal discussion.

As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.

Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere. There also is no doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.

There are no collections or solicitations of funds at these meetings, and there are no specific rituals or practices of any particular denomination or sect.

I assume that the foregoing information will be sufficient. If more is needed, please let me know and we will be happy to provide it for you. In the meantime, I am herewith resubmitting in behalf of Cornerstone the group's request for the use of University facilities.

In view of the recent Delaware decision enclosed with my letter to Mr. Wright, I do not feel the University could be criticized for allowing Cornerstone to continue to meet pending further clarification of the law. And I must point out that it is very important to my clients that they be able to continue to use University facilities, particularly in view of some special meetings planned during mid-February.

Thank you for your consideration.

Very truly yours,

James M. Smart, Jr.

JMS:js
Enclosure

cc: Mr. Marvin Wright

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title omitted in printing)

ORDER ON PRETRIAL CONFERENCE

At a conference held April 26, 1978, in the Court's chambers in Kansas City, Missouri, with counsel for the parties present the following agreements by the parties were made:

1. No evidentiary hearing will be required in this case and the case can be decided on the stipulation of fact and attached exhibits filed April 13, 1978;

2. At the direction of the Court, each party is to file a motion for summary judgment; and

3. Plaintiffs are to file a brief in support of their position on May 26, 1978. Defendants are to file their responsive brief on June 9, 1978, and plaintiffs will have until June 23, 1978, within which to file any reply.

If any of the agreements herein set out are not according to the recollection of the parties, they shall file written suggestions within ten days from this date.

/s/ William Collision
District Judge

Dated: April 27, 1978.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title omitted in printing)

SUPPLEMENTAL STIPULATION OF FACT

Come now the parties herein and, in order to expedite the disposition of this matter, further agree and specifically stipulate to the following items, subject to the reservation by the parties of the right to object to the admissibility of these stipulated items on grounds of lack of materiality and relevancy:

1. Exhibit 1 sets out the language appearing on page 35 of the booklet entitled "University of Missouri - Kansas City New Student Information 1978 - 1979." This booklet was published by UMKC to provide information to new students for the 1978 - 1979 school year.

2. Exhibit 2 is an accurate copy of a memorandum prepared for Gary Widmar, Dean of Students at UMKC by Paul J. Parker, Assistant Dean of Students, on January 30, 1978.

3. Exhibit 3 is an accurate copy of a document prepared by the UMKC business office reflecting the projected budget of the UMKC University Center for the 1977 - 1978 school year. The term "other income" in the column itemizing income received in connection with the University Center does not include monies from the Treasury of the State of Missouri.

4. Exhibit 4 shows the increase in student fees adopted by the Curators of the University of Missouri system, effective with the fall semester, 1978 - 1979.

5. Presently, the "Center - Activity - Athletic Fee" is $35.00 for a student carrying ten or more credit hours. Of that sum, the amount of $15.00 is allocated to the operation of the University

Center, $12.50 is allocated to the Student Activity budget, $5.00 is allocated to athletic programs, and $2.50 is allocated to physical facility development. Effective the fall semester of the 1978 - 1979 year the portion of the new $41.00 total fee allocated to the operation of the University Center will be $21.00.

IN WITNESS WHEREOF, the undersigned attorneys have hereunto set their hands this 1st day of June, 1978.

For: Jackson A. Wright
/s/ Marvin E. Wright
James S. Newberry
Ted D. Ayres
227 University Hall
Columbia, Missouri
65201

ATTORNEYS FOR
DEFENDANTS

For: /s/ James M. Smart, Jr.
1134 Home Savings
Building
1006 Grand Avenue
Kansas City, Missouri
64106

and

William H. Pickett
Pickett & Midkiff
Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri
64106

ATTORNEYS FOR
PLAINTIFFS

Exhibit 1

Student Activities

The student activities program is coordinated by the STUDENT ACTIVITIES OFFICE located in the University Center. Through various student organizations, boards and committees, cultural, social, educational and recreational programming is provided. The aim is to make student free time activity, a cooperative aid to academic study.

In all its functions the student activities program encourages self-directed activity. This provides a great opportunity self-realization and individual growth while participating in programming for the entire student population or for a special interest group. The overall goal is to develop social and cultural awareness as well as intellectual curiosity. Students plan events and programs in such a way that they learn while working and find enjoyment at the same time.

In extracurricular affairs, students govern themselves in accordance with the All Student Association (ASA) constitution. The legislative body is the Student Council, a representative group of students elected annually by the student body. The ASA recommends funding and acts as an advocate of student rights.

Activities provide an excellent opportunity for all students to meet and work with the administration and faculty, as well as local community groups. Social and fiscal responsibility and leadership in our democratic society is a prime requirement for the educated individual. Student activities attempts to provide opportunity in these areas.

Most activities and the ASA offices are housed in the University Center which is dedicated to serving the social, co-curricular and cultural needs of UMKC. Student programs in the University Center often include lectures, symposia, concerts, discussions, receptions, chess and bridge tournaments, as well as many other

special events sponsored by the ASA and its programming division, the University Program Council.

Annual activities include the popular and foreign film series, various, campus orientation programs, Bum Friday, intramural athletic competition, Wilderness Outing Club, student government elections, Wallaby's Coffeehouse . . .

Exhibit 2

UNIVERSITY OF MISSOURI-KANSAS CITY
Office of Student Life
131 University Center
Kansas City, Missouri 64110
Telephone (816) 276-1407

January 30, 1978

Memorandum

TO: Gary Widmar
Dean of Students

FROM: Paul J. Parker
Assistant Dean of Students

Per your request, please find below a description of the Student Activity Fee Budget.

History of the Student Activity Fee

The present Student Activity had its origin in the Kansas City University days of the University of Missouri-Kansas City. Students voted in the Spring of 1953 to assess themselves and future students a $7.50 fee specifically for campus programming activities. This fee remained constant over 22 years while pro-

gramming costs (fees, printing, advertising, travel, etc.) and the need and demand for more programs increased geometrically.

In F.Y. 1974-75 the All Student Association and others realized that the reasonable and adequate funding of annual programs was in serious jeopardy, not to mention the outright cancellation of many new kinds of needed programs. Because of this realization, a $5.00 increase in the basic Student Activity fee was proposed and passed by the Board of Curators in June of 1975. Along with this increase a $2.50 Intercollegiate Sports and a $2.50 Physical Facility Development fee was also proposed and approved.

Presently, the total mandatory fee charged each full-time student, in addition to the Incidental Fee and/or other laboratory or special fees, is broken down as follows:

Allocation:	**Semester**	**Quarter**	**Summer**
Student Activity Fee			
Student Programming	12.50	8.95	6.25
Physical Facility Devel.	2.50	1.80	1.25

Allocation:	**Semester**	**Quarter**	**Summer**
Athletic	5.00	3.55	2.50
University Center	15.00	10.70	7.50
Total:	35.00	25.00	17.50

NOTE: For any other sessions and for partial enrollments, the above fees are calculated at the rate of $3.50 per credit hour or fraction thereof, except that there shall be a maximum fee as indicated above.

The Budgeting and Expenditure Process

Before the fees are collected, the All Student Association prepares a detailed line-item budget request for the coming fiscal year as well as evaluations of the previous year's programming activity. After the ASA Finance Committee and Student Council have reviewed and recommended budgets to the Dean of Students, the Dean's Advisory Committee (composed of faculty, students, and staff) review the budget proposals again and make recommendations to the Dean regarding these budgets. The Dean of Students forwards the thrice-reviewed budget to the Chancellor for inclusion as part of the total campus budget plan.

Throughout the fiscal year, the Office of Student Life staff exercises its program advising and budget control functions regarding these approved budgets, assuring that expenditures are in accord with University policy. Thus, from the conception of the ASA budgets to the execution of its spending plan, scrutiny is being exercised constantly at many levels.

Program Expenditures

The following illustration shows how the All Student Association allocated its funds for the last four fiscal years:

	1974-75	1975-76	1976-77	1977-78
School Councils	54,699	70,374	72,475	73,872
Campus Wide Programs	99,356	153,700	192,400	208,227
Special Interest Groups	4,500	11,250	13,190	14,150
Physical Facility	15,000	43,095	50,588	45,296
ASA General Operating	15,000	25,840	15,000	13,015
Total:	188,555	304,259	343,653	354,560

The Five Program Categories

Below is an explanation of the kinds and types of programs involved in each of the five major program categories:

School Councils — Programs sponsored by the nine school councils are primarily directed toward their own co-curricular and extra-curricular student life needs. In addition to sponsoring various academic, recreational, cultural, social and service functions for their constituencies, several of the school councils conduct symposia and workshops on a special topic of central concern. In order to meet their administrative or operating costs, school governments also have a program designed to cover the costs of mailings, purchases, communications, and salaries.

Campus Wide Programs — The Intramural Sports Program, Communiversity, the *University News,* the University Program Board, the Cultural and entertainment activities of the University Program Board and the Student Services Commission, all represent programs which have campus-wide appeal and interest. In general, these types of programs span the distance between school council programs and those of ethnic and/or special interest groups. Without this segment of student programming being active and creative, the campus' social, cultural, entertaining, and service needs would go unmet.

Special Interest Groups — Just as the University is responsive to the various educational needs of society, it must also be responsive to the various ethnic and non-academic special interest groups within the University. The University has officially recognized over 90 active student organizations, each with its specific area of interest. Ethnic organizations, such as Jewish College Students, United Mexican American Students, and The Afro-American Student Union, focus on the issues and concerns of their particular ethnic heritage. There are political organizations, such as Young Socialist Alliance, Women's Union, Young Democrats, and so forth. Also there is a broad spectrum of nonethnic special interest groups such as the Fencing Club and Bridge and Chess Club, the Karate Club, Mortar Board, Omicron Delta Kappa, etc. These groups are formed by students to provide another dimension to the student's life on campus - the extra and co-curricular experience.

Physical Facilities Development — The All Student Association and the University are cooperating in the joint venture of providing funds for badly needed recreational facilities. These funds will be available for tennis courts, outdoor handball courts, and other recreational facilities.

ASA Operating — The All Student Association is the central student governing body on campus. It has representatives from each of the academic school councils. Its powers are chiefly legislative and recommendatory. In order to accomplish its goals, a variety of administrative or operational expenses must be incurred and planned for next year. Such an operating program provides for the salaries of officers, correspondence, printing, elections, travel, office supplies, which are necessary for the operation of the central student government.

Please let me know if you require any additional information prior to our January 31st meeting on the Student Activity Fee Budget.

PJP/ggs

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title Omitted in Printing)

FIRST AMENDED COMPLAINT

Comes now plaintiffs herein and, pursuant to leave of court, for their amended complaint against defendants state as follows:

1. This action is brought pursuant to Title 28, United States Code, Section 2201, and Title 42, United States Code, Section 1983, for the purpose of having declared and adjudged unconstitutional, and to enjoin the enforcement of, certain regulations of the University of Missouri promulgated by the Board of Curators, to-wit: the regulations numbered 4.0314.0107 and 4.0314.0108, which prohibit the use of university facilities by students for purposes of either "religious teaching" or "religious worship." A copy of the exact language of these regulations is attached hereto as Exhibit A and made a part hereof by reference.

2. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1343 (3), this being a suit in equity which is authorized by law, Title 42, United States Code, Section 1983, to be brought to redress the deprivation under color of state law of rights, privileges, and immunities secured by the Constitution and laws of the United States. The rights here sought to be redressed are rights guaranteed by the Free Exercise and the Freedom of Expression Clauses of the First Amendment, and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to the Constitution of the United States, as hereinafter more fully appears.

3. Venue is proper in this judicial district pursuant to the provisions of Title 28, United States Code, Section 1391(b) in that this is a civil action wherein jurisdiction is not founded solely on diversity of citizenship; the claim arose in this judicial district; and defendant Dean Widmar resides, and defendant members of the Board of Curators maintain their office, in this district.

4. The plaintiffs are individual students enrolled at the University of Missouri—Kansas City (hereafter "UMKC") involved in a recognized student organization by the name of Cornerstone. Plaintiffs, as a group, seek enforcement of the right to use university facilities as a place in which to hold meetings for the religious purposes of the group.

5. Defendant Gary E. Widmar is the Dean of Students at UMKC, his office being located in Scofield Hall near 5100 Rockhill Road, Kansas City, Missouri.

6. The defendant Board of Curators is an official body established by the State of Missouri for the government of the University and its affairs. The office of the Board of Curators is located in Columbia, Missouri. Service of process upon the defendant Board of Curators may be obtained by serving a copy of the summons and petition upon the President of the Board of Curators, to-wit: Mr. Van Williams, President, National Bank in North Kansas City, 320 Armour Road, North Kansas City, Missouri.

7. Defendants Berkmeyer, Brenner, Dempster, Doak, Johnston, Olham, Stacey, Williams, and Williams are individual members of the Board of Curators, duly constituted pursuant to law.

8. Although student religious groups had been using the facilities of the University of Missouri, including the Student Union facilities, as a meeting place for meetings which included religious discussion, teaching, and prayer, for many years, the Board of Curators, acting under color of state law, promulgated the regulations set out in Exhibit A in 1972.

UNIVERSITY OF MISSOURI-KANSAS CITY UNIVERSITY CENTER

1977-78 Budget and Projected Budgets
Without a Fee Increase

	1977-78 Budget	1978-79 Projected	1979-80 Projected	1980-81 Projected
INCOME				
Food Service and Vending Income	$ 689,000	$ 745,625	$ 796,540	$ 853,700
Games Room Income	16,720	17,980	18,500	19,000
Other Income	14,500	15,500	16,000	17,000
Student Fee Income	285,000 (1)	272,000 (1)	277,440	282,900
Gross Income	$1,005,220	$ 1,051,105	$ 1,108,480	$ 1,172,600
EXPENSES				
Repair and Replacement	$ 59,100	$ 64,090	$ 68,580	$ 73,360
Food Costs	224,900	245,160	261,790	280,520
Salaries	190,462	203,795	218,060	233,325
Wages	305,804	323,560	346,210	370,445
Staff Benefits	53,806	57,860	62,210	66,890
Employee Meals	11,029	11,800	12,625	13,510
Travel	5,775	6,180	6,610	7,070
Communications	8,585	9,185	9,830	10,520
Rents and Trash Hauling	10,650	11,460	12,300	13,290
Utilities	(2)	113,820	124,710	138,450
Paper Supplies (Food Service)	16,125	17,255	18,460	19,750
Supplies (Office and Janitorial)	17,875	19,125	20,465	21,900
Insurance	1,800	1,925	2,060	2,205
Laundry	3,200	3,425	3,665	3,920
Miscellaneous	6,325	6,770	7,245	7,750
Physical Plant Administration	(2)	14,240	15,090	15,945
TOTAL EXPENSES	$ 915,436	$ 1,109,650	$ 1,189,910	$ 1,278,870
NET INCOME FROM CENTER OPERATIONS before Adjustments	$ 89,784	$ (58,545)	$ (81,430)	$ (106,270)
Adjustments to Income	$ (2)	$ 93,479	$ 89,022	$ 95,255
Institutional Use Charge				
Residence Hall Portion of Debt Service	27,117	42,000	42,000	42,000
SUB-TOTAL	$ 116,901	$ 76,934	$ 49,592	$ 30,985
1.35% Debt Service	(113,297)	(113,297)	(113,297)	(113,297)
ADJUSTED NET INCOME	$ 3,604	$ (36,363)	$ (63,705)	$ 82,312)

(1) $255,000 budgeted for 77-78 is known to be overstated. Actual should have been $278,000. Applying projected decrease (7%) in enrollment for 1978-79. $272.000 was used as a base for computing student fee income.

Exhibit 3

Exhibit 4

REGULAR SEMESTER

(16 week)

CREDIT HOUR	INCIDENTAL FEE	CENTER AND ACTIVITY FEES	NON-RESIDENT TUITION	TOTAL NON-RESIDENT	TOTAL RESIDENT
1	$ 38.50	$ 4.10	$------	$ 42.60	$ 42.60
2	77.00	8.20	------	85.20	85.20
3	115.50	12.30	------	127.80	127.80
4	154.00	16.40	------	170.40	170.40
5	192.50	20.50	------	213.00	213.00
6	231.00	24.60	------	255.60	255.60
7	269.50	28.70	(7) 198.00	(7) 496.20	298.20
8	308.00	32.80	(8) 396.00	(8) 736.80	340.80
9	339.00	36.90	(9) 508.00	(9) 883.90	375.90
10 or more	339.00	41.00	(10) 678.00	(10) 1058.00	380.00

These charges supersede all previous charges shown in University Bulletins and Catalogs.

Exhibit 4

3-9-78

9. On or about January 5, 1977, the students involved in Cornerstone submitted a Request for Use of University Facilities (UMKC Form No. 740) pursuant to established procedures of the University, requesting the use of facilities for their meetings during the semester. The facilities were desired as a place in which to hold meetings which usually include prayer and discussion of religious topics. The group had obtained permission to use such facilities, and had used them in this manner, in the past. In February, Cornerstone was advised, through the University Counsel's Office and defendant Dean Widmar, that such meetings could not be permitted in view of the fact that worship was "an important part of the general atmosphere of the meetings" and that such meetings would be in violation of university regulations.

10. The provisions of the said regulations pursuant to which the University has acted in denying the use of facilities to the plaintiffs are in violation of the Constitution and laws of the United States in the following respects:

A. The regulations place an impermissible and undue burden on the free exercise of religion and on the freedom of expression in violation of the First Amendment of the Constitution of the United States, as applied to the states through the Fourteenth Amendment, in that they fail to make a reasonable accommodation of the religious needs of the students by forcing the students to hold such meetings away from the grounds of the University. This, in effect, destroys any benefit derived by Cornerstone from being a recognized student organization, and thereby effectively nullifies the official recognition of the organization, and makes it extremely difficult for students interested in these activities to meet as a group.

B. The regulations in question constitute, under the circumstances here present, active hostility against and unlawful discrimination against religion, and an undue

burden on freedom of expression in violation of the First Amendment, as applied to the states through the Fourteenth Amendment to the Constitution of the United States, in that these regulations single out religious expression from among all other types of expression, and exclude such religious expression from the grounds of the University, while permitting students to gather for purposes of other types of expression. Such discrimination is unlawful in that there is no valid and compelling state interest being protected by the University in excluding such religious expression from the grounds of the University.

C. The regulations violate the freedom of expression provision of the First Amendment, as applied to the states through the Fourteenth Amendment, in that the enforcement of the regulations will tend to lead to unlawful censorship of the meetings of religious groups by the University in violation of the First and Fourteenth Amendments. Such censorship would tend to be employed by the University in the instances where the University seeks to determine whether or not elements of the "religious teaching" or "religious worship" are present at such meetings.

D. The regulations in question are impermissibly and unconstitutionally vague and overbroad in violation of the Fourteenth Amendment to the Constitution of the United States in the following particulars:

1. The regulations do not define "religious teaching," nor do they make clear when religious subjects may be discussed and when they may not; and

2. The regulations do not define "religious worship" nor do they explain why prayer, which is generally considered one form of "worship" is permitted, but "an atmosphere of worship" such as that occurring at the meetings of Cornerstone, is not permitted.

3. The language goes so far as to preclude a group from holding a meeting where worship is "an important part of the general atmosphere" even though the meeting is not essentially a "worship meeting"; and

4. The ban against "religious teaching" goes so far as to preclude the discussion of religion as it bears on such subjects as the origin of man, the nature of man, and the future of man, which subjects are an integral part of the questions which students, in the academic atmosphere of the University, are entitled to discuss, pursue, and even to attempt to persuade others to their point of view; and

5. The regulations go beyond the requirements of the Missouri Constitution related to separation of church and state, as well as beyond the requirements of the Establishment Clause of the First Amendment of the Constitution of the United States, in that these regulations go beyond dealing with state establishment of, aid to, and undue entanglement with, religion; and instead these regulations deal with the question of what private individuals may discuss and do among themselves, without the question of state aid or sponsorship being involved. Indeed, the language of the regulations as applied in this instance, even go so far as to preclude a particular mental attitude (an attitude of worship) from the grounds of the University.

E. The regulations in question are unduly arbitrary and capricious and therefore deny plaintiffs' equal protection of the law and deprive plaintiffs of liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that while it extends to student groups the right to use any chapels on the grounds of the University for religious purposes (although

on an irregular and limited basis), the University has failed, at the UMKC campus, to provide or designate any such chapel. Further, even if there were such a chapel on the grounds at UMKC, the relegation of religious teaching and religious worship to a chapel, as opposed to allowing these matters the same treatment as other types of expression, constitutes an unlawful discrimination against and an impermissible attitude of hostility against religion in violation of the First Amendment, as applied to the states through the Fourteenth Amendment of the Constitution of the United States, in that it classifies religion as something which, in the generally open academic atmosphere of a university, must be confined only to chapels.

The regulations in question further violate the Equal Protection Clause of the Fourteenth Amendment in that they unlawfully deny to plaintiffs equal access to a public forum. Although defendants allow student groups to meet on University grounds and in University facilities to pursue many different special interests, the defendants unlawfully discriminate against meetings containing elements of religious teaching or religious worship. Plaintiffs are thereby unlawfully and unconstitutionally denied equal access to the forum for the pursuit and advocacy of their special interest, while others, in contrast, are freely allowed to pursue their special interests without censorship or prohibition.

F. In addition to unlawfully interfering with the free exercise of religion, the regulations in question also violate the establishment provision of the First Amendment to the Constitution of the United States, as applied to the states through the Fourteenth Amendment, in that the heavy-handed banning from the campus of all those matters traditionally considered "religious" through the enforcement of these regulations has the effect on the campus of establishing and promoting a religion of secularism.

11. Defendant Board of Curators, by promulgating the said regulations under color of law, and the defendant Gary Widmar, by engaging in the enforcement, execution, and administration of the provisions of said regulations under color of law, have deprived and will continue to deprive, unless restrained, the plaintiffs and others similarly situated of their rights to freedom of expression and freedom of religion under the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States.

12. The damage and injury done to the plaintiffs by reason of being deprived of the foregoing rights is continuing and irreparable, and there is no adequate remedy at law. Any other remedy to which plaintiffs could be referred would be attended by such uncertainties and delays as to deny substantial relief, cause further irreparable injury, and occasion damage, vexation, and inconvenience to the plaintiffs.

WHEREFORE, plaintiffs pray that this Court:

1. Issue a preliminary injunction directing the defendant Dean Gary E. Widmar to immediately approve the application of Cornerstone for the use of University facilities, and to give notification of such to Cornerstone through the undersigned attorney for plaintiffs, and further directing defendant Board of Curators of the University of Missouri, Dean Gary E. Widmar, and all other agents, officials, and employees of the University of Missouri to cease enforcing, administering, or in any manner giving effect to said regulations; and

2. Adjudge and declare said regulations to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and therefore unconstitutional and void; and

3. Issue a permanent injunction restraining the Board of Curators and all officials, and agents, and employees of the University from enforcing, executing, administering or in any manner giving effect to said regulations; and

4. Grant plaintiffs the costs of this action, including reasonable attorneys fees, pursuant to Title 42, United States Code, Section 1988, and such other and further relief as may be just and equitable in the premises.

/s/ James M. Smart, Jr.
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Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

Exhibit A

(University Regulations omitted in printing)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Title omitted in printing)

ANSWER TO FIRST AMENDED COMPLAINT

Come now the Defendants herein and for answer to Plaintiffs' First Amended Complaint state that the Defendants and each of them:

1. Deny the allegations of paragraph 1 except that Defendants admit that Exhibit A to Complaint is a true copy of regulations adopted by the Board of Curators of the University of Missouri and that such regulations are in effect at this time.

2. Deny the allegations of paragraph 2.

3. Admit the allegations of paragraph 3.

4. Admit that the individual Plaintiffs are or were enrolled as students at the University of Missouri—Kansas City, but are without knowledge or information as to the other allegations contained in paragraph 4, and therefore deny such other allegations.

5. Admit the allegations of paragraph 5.

6. Admit that Defendant Board of Curators is an official body established by the State of Missouri for the government of the University of Missouri and that the office of the Board of Curators is located in Columbia, Missouri. The Defendants deny the other allegations contained in paragraph 6.

7. Admit the allegations of paragraph 7, except to advise that Curator Van Williams has resigned from said Board since the initiation of this suit.

8. Deny the allegations contained in paragraph 8.

9. Admit that a request was received for the use of University facilities in early 1977 by or on behalf of a group known as Cornerstone and admit that such request was denied on the grounds that the proposed use for religious purposes was in violation of the regulations of the University. Defendants deny the other allegations contained in paragraph 9.

10. Deny all allegations contained in paragraph 10.

11. Deny all allegations contained in paragraph 11.

12. Deny all allegations contained in paragraph 12.

13. Deny all allegations of Plaintiffs' Complaint not herein specifically admitted.

WHEREFORE, having fully answered, Defendants pray to be dismissed hence with their costs and reasonable attorney fees and for such other and further relief as to the Court shall seem meet and proper.

Respectfully submitted,

Jackson A. Wright
Marvin E. Wright
James S. Newberry
Ted D. Ayres
227 University Hall
Columbia, Missouri 65201

(Certificate of Service omitted in printing)

Supreme Court, U. S.
FILED
NOV 29 1980
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No. 80-689

In the Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, et al.,
Petitioners,

vs.

CLARK VINCENT, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 80-689

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GARY E. WIDMAR, et al.,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REFERENCES TO THE RECORD

References to the record in this brief will be by citation to the items included in the Appendix to the Petition for Certiorari. The term "Appendix" used herein shall mean the Appendix to the Petition for Certiorari.

INTRODUCTION

In this case, the United States Court of Appeals held that adult, private individuals could not be discriminatorily prohibited from associating in a public forum for the purpose of engaging in voluntary religious speech and religious activity where other groups are permitted to meet and pursue their special interests without restriction and without censorship.

The University, in urging this Court to grant certiorari, states that this case is of great importance because it will affect "every public college and university . . . in the United States." (Petition for Certiorari, page 8). Student-Respondents respectfully disagree. The colleges and universities affected by this decision are only those which have not *already* permitted voluntary student religious activity on campus.[1]

The University also implicitly seeks to cause the Court to feel that religious activities on campus will be disruptive to the academic climate. The University seems to forget that from 1972 or 1973 until January, 1977, the University ("UMKC") allowed Cornerstone and other religious groups to meet on campus without censorship or restriction of their activities (Appendix at A-32, 33) because the University did not have "full knowledge" of the religious nature of the activities (Appendix at A-31, para. 9). There is no indication in the record that during those years the campus was caused to undergo any trauma or tumult, or interference with academic life, as a result of such religious activity. Nor does the record indicate that the rights of anyone, taxpayer or otherwise,

---

1. Although there is not a great deal of available data showing just how many colleges and universities permit religious teaching and religious worship on campus, there is data available suggesting that a substantial percentage of institutions do. In 1973, Dr. George W. Jones, Director of Religious Programs and Professor of Higher Education at Ball State University published the results of a study he conducted showing the broad range of different approaches to religious accommodation employed by colleges and universities nationally. Some of the approaches, on one hand, included an official "religious emphasis week" and a university - employed Coordinator of Religious Activities. On the other hand, some universities went so far as to refuse official recognition, and the privileges attendant thereto, to student religious groups. *The Public University and Religious Practice: An Inquiry Into University Provision for Campus Religious Life,* Jones (Ball State University, 1973). This monograph, which will be gladly furnished to the Court upon request, also contains an excellent bibliography of related articles.

were violated simply because students interested in religious activities met on campus for prayer, Bible study, and similar pursuits.

The University fails to set forth any valid reason why certiorari should be granted in this case. The opinion of the Court of Appeals is in accordance with settled constitutional law and provides clear direction and guidance to those universities which must now implement changes in their regulations. The decision does not in any sense erode away the legitimate, intended reach of the Establishment Clause because the decision does not endorse official sponsorship or promotion of religious activities, but simply mandates a neutral and reasonable accommodation of religious exercise by private individuals. The decision recognizes that the Establishment Clause was never intended to be used as a bludgeon against the free exercise of religion,[2] and the decision shows the strong commitment to the protection of individual liberties which has characterized the decisions of this Court.

This case has nothing to do with state-sponsored prayer or governmentally-orchestrated religious indoctri-

---

2. In *Engel v. Vitale*, 370 U.S. 421 (1962), Mr. Justice Black, author of the majority opinion, noted that there were two purposes behind the Establishment Clause. One reflects a recognition of the fact that a union of government and religion tends to destroy government and to degrade religion. The second purpose arose out of the awareness of the drafters that "governmentally established religions and religious persecution go hand in hand" *Id.* at 432. Both provisions, therefore, were ultimately designed *to protect freedom of religion.*

> "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618 (1978) at 642 (Brennan and Marshall, JJ., concurring).

nation. Nor does the case involve an effort by the Student-Respondents to obtain any more accommodation or favoritism for their meetings or their purposes than that which is afforded other special interest groups on campus. Nor does the case involve any disruption or interference with the academic purposes and atmosphere of the University. Nor does the case involve a religious group applying for a financial grant or financial assistance of any sort. It merely involves the right of these religiously motivated students to use the buildings and grounds of the University, like other special interest groups, and without favoritism or pre-emption of space from other groups, to pursue their own special interest.

ARGUMENT

I. The Decision of the Court of Appeals in This Case Is Not in Conflict With Any Decisions of This Court.

The opinion of the Court of Appeals shows careful reliance upon the law and doctrines of past decisions of the United States Supreme Court, and there are no decisions in conflict with the Eighth Circuit ruling in this case. In fact, this Court was once previously asked to grant certiorari in a case of essentially identical facts, and this Court declined to do so, leaving intact the decision of the Supreme Court of Delaware which upheld the right of university students to engage in religious exercise on campus. *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), reh. denied, 425 U.S. 945 (1976). In that case, the University of Delaware had attempted to enjoin Roman Catholic students from conducting a mass in the commons area of a dormitory on campus, relying on establishment argu-

ments.[3] The Court of Chancery found that the rights of the students were not "substantially" infringed by a denial of permission, and granted the injunction. 318 A.2d 135, at 142. The Supreme Court of Delaware, however, reversed the decision of the lower court, holding that the students' first amendment rights were unconstitutionally burdened by such a restriction, even though Catholic churches were available off campus in nearby locations.

Furthermore, the Court of Appeals decision in this case is distinctly in harmony with principles established and clarified in previous Supreme Court decisions. For instance, this Court enunciated the doctrine that equal access to a public forum must be granted on an equal basis to all who would peaceably use it without regard to the content of the proposed expression. *Police Department v. Mosley*, 408 U.S. 92 (1972) (an area had been opened by the city to labor picketing, but not to picketing or expression with regard to other matters). This Court has also vindicated the right of university students to be recognized and to use university facilities in pursuit of their special interests, without regard to the university's approval of their purposes. *Healy v. James*, 408 U.S. 169 (1972) (Students for a Democratic Society could not be refused recognition and the right to meet on campus).

The three-pronged Establishment Clause analysis employed by the Court of Appeals was originally promul-

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3. Petitioners contend that "there were apparently no prohibitions contained in the Constitution of the State of Delaware" (footnote 1, page 9, of their Petition). But Petitioners fail to note the fact the University of Delaware Charter (14 Del. C. Section 5103) provided that the "University shall never be managed or conducted in the interest of any party, sect or denomination." *University of Delaware v. Keegan*, 318 A.2d 135 (Del. Chancery, 1974).

gated by this Court,[4] and has been employed by this Court on many occasions.[5]

The decisions of this Court have also accorded great protection to individual rights of religious freedom as well as freedom of speech.[6] Included in the decisions of this Court have been those clearly mandating the accommodation of religious speech and exercise on public property. *Tucker v. Texas*, 326 U.S. 517 (1946) (minister could not be prosecuted for refusal to cease distribution of religious literature in a town owned by the federal government); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (minister could not be prosecuted for holding religious meetings in public park without a permit); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (Jehovah's Witnesses could not be denied the right to hold "Bible talks" in a public park. *Poulos v. New Hampshire*, 345 U.S. 395 (1953) (blanket refusal to license religious services in public park violated first amendment). "Government may not interfere with efforts

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4. *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

5. *E.g., Tilton v. Richardson*, 403 U.S. 672, reh. denied, 404 U.S. 874 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Committee for Public Education v. Regan*, ... U.S. ....., 63 L.Ed.2d 94 (1980).

6. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents could not be denied the right to send their children to church-operated schools); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unlawful to deny unemployment benefits to Sabbatarian who could not secure employment due to her conscientious refusal to work on Saturday); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents could not be forced to comply with requirements of compulsory formal education after the eighth grade where such requirement presented serious conflict with the free exercise of their religious beliefs.

> "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the *religious liberty* protected by the Free Exercise clause . . ." Stewart, J., concurring in *Sherbert, supra*, at 413 (emphasis supplied).

to proselyte or worship in public places." *McDaniel v. Paty*, 435 U.S. 618 (1978) at 640 (Brennan, J., concurring).

This Court has never held, as Petitioners seek to persuade it to hold, that constitutional provisions relating to separation of church and state require the prohibition of private religious activity where the factual context includes any contact with government. Indeed, the Court has long acknowledged that "no perfect or absolute separation" is really possible; and that the "very existence of the Religion Clauses is an involvement of sorts—one that seeks to work boundaries to avoid excessive entanglement." *Walz v. Tax Commission*, 397 U.S. 664 (1969) at 670.

The Court has also recognized an affirmative duty to accommodate free exercise when such activity does not interfere with the rights of others.

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. *Zorach v. Clauson*, 343 U.S. 306 (1952) at 313-314.

There is, of course, no conflict between the decision of the Eighth Circuit in this case and the Supreme Court prayer and Bible reading cases.[7] Those cases all involved

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7. *Abington Township School District v. Schempp*, 374 U.S. 203 (1962); *Engel v. Vitale* 370 U.S. 421 (1962); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction during school hours on school property), involved sponsorship and entanglement, although the coercion factor was less than in *Schempp* or *Engel*.

elements of religious *sponsorship* or of *coercion* by the *state*, which violated the rights of those of a different religious viewpoint. Nor is there any conflict with the recent "Ten Commandments" decision of this Court[8] because that case involved *official state action*, not simply the neutral accommodation of the actions of private individuals. Nor is there any conflict with the decisions of this Court relating to public financial assistance to religious institutions and activities,[9] because the "financial assistance" element here is the same as in the public park cases.[10]

The fact that the decisions of this Court clearly reflect a recognition of the necessity for government accomodation of free speech and free exercise, the fact that this Court has previously refused to grant certiorari to review these issues,[11] and the fact that this Court has shown such a strong commitment to freedom of expression and to the open marketplace of ideas in our universities,[12] all indicate that this case is in harmony with the previous decisions of this Court.

II. The Decision in This Case Is Not in Conflict With the Decisions of Any Other Circuit.

No Circuit Court of Appeals has rendered any decision in conflict with the decision in this case. The federal dis-

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8. *Stone v. Graham*, Case No. 80-321, decided Nov. 17, 1980.

9. *E.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Committee for Public Education v. Regan*, ... U.S. ....., 63 L.Ed.2d 94 (1980).

10. *E.g., Fowler v. Rhode Island, supra; Niemotko v. Maryland, supra.*

11. *Keegan v. University of Delaware*, 349 A.2d 14 (1975), cert. denied, 424 U.S. 934 (1976), reh. denied, 425 U.S. 945 (1976).

12. *Healy v. James*, 408 U.S. 169 (1972).

trict courts in other circuits have ruled on similar issues involving religious speech and exercise by university students.[13] In addition, other high level appellate courts have also ruled on the same or on similar issues involving use of university faciliities for religious meetings.[14] And another United States Court of Appeals, in deciding whether the National Park Service should be enjoined from allowing the Pope to conduct services on the national mall, dealt with many of the issues in this case. *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979).

The only court decision anywhere which holds that discriminatory restrictions can be placed on the use of university facilities by student religious groups is *Dittman v. Western Washington University*, ... F. Supp. ....., Cause No. 79-1189V (W.D. Wash., 1980) (appeal docketed, 9th Cir., No. 70-3120, Apr. 7, 1980). In that case, Western Washington University regulations permitted limited use of university facilities by religious groups, upon the payment of a rental charge, while other student groups were permitted unrestricted use of facilities without charge. The decision of the U.S. District Court in that case was rendered shortly after the District Court decision in this case.[15]

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13. *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969) (a three-judge court struck down a university regulation prohibiting students from hosting religious speakers on campus) *Id.* at 975-76. *Dittman v. Western Washington University*, ... F. Supp. ....., Cause No. 79-1189V (W. D. Wash. 1980) (appeal docketed, No. 80-3120, 9th Cir. Apr. 7, 1980) (the university could refuse to give equal accommodation to religious activities, but could not *totally* deny accommodation). This case is discussed *infra*.

14. *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), reh. denied, 425 U.S. 945 (1976), discussed *supra*. *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 520 P.2d 514 (En Banc 1974) (upheld the rental for seven consecutive days of the Arizona State University stadium by the Billy Graham organization).

15. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo., 1979), was decided December 11, 1979. The *Dittman* case was decided February 27, 1980.

The *Dittman* Court was undeniably influenced by the District Court decision in *Chess*,[16] and found itself trying to reconcile Judge Collinson's opinion in *Chess* with the decision of the Supreme Court of Delaware in *Keegan, supra.* The result of that effort was the interesting ruling that a certain amount of discrimination against religious activity on campus is justifiable in the interest of separating church and state, as long as religious activity is not *totally* forbidden. The obvious problem with such a ruling is that it becomes very difficult to determine just *how much* discrimination against religious speech and exercise in a public forum can be permitted in the name of separating church from state. The theory is a dangerous one because it gives the state the right to restrict first amendment liberties in a public forum; and it gives the administrator, who exercises discretion as to the amount of accommodation to be allowed, no clear guidance or standards by which to allocate access to the facilities.

Since the District Court in *Dittman* was influenced heavily by Judge Collinson's District Court opinion in this case, which has now been solidly reversed, the Ninth Circuit should have no difficulty in reversing the District Court decision. If it fails to do so, then *that* case, and not this one, would be the appropriate case in which to grant a writ of certiorari. In any event, because of its reliance upon *Chess* at the District Court level, *and because of the likelihood of being reversed,* the *Dittman* case can be discounted as representing any conflict with the Eighth Circuit decision in this case.

III. The Decision of the Court of Appeals Is Correct.

The Eighth Circuit opinion in this case capably deals with the issues, provides illumination as to the analysis

16. The *Chess* decision is mentioned three different times in the opinion in *Dittman.*

employed, and expressly rebuts the major arguments of the University. Student-Respondents do wish, nevertheless, to briefly discuss several key aspects of the decision.

A. The Court Correctly Found That the Buildings and Grounds of the University Commonly Used for Voluntary Student Activities Constituted a Public Forum.

The University contends that a policy of allowing religious groups to meet on the campus would constitute an endorsement by the University of the purposes of the religious groups. The University thus fails to recognize that it has created a public forum, and that a nondiscriminatory policy of allowing equal access to the forum by all recognized groups does not constitute sponsorship or endorsement of the purpose or message of any group.[17] The University has "officially recognized *over ninety* active student organizations, each with its specific area of interest," (Appendix at A-3, footnote 1) and one of the benefits of official recognition is the right to use the facilities of the University (Appendix at A-27). The Eighth Circuit correctly found these facilities to be a public forum, a place where private association and expression can take place without censorship as to content of matters discussed. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gay Students' Organization v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979); *Spartacus Youth League v. Board of Trustees*, ... F. Supp. ....., Case No. 78-C-1224 (N.D. Ill., April 2, 1980). Hence, even if the State of Missouri could show a compelling state interest

17. The District of Columbia circuit noted that when the forum is available to all kinds of religionists and anti-religionists (including the Pope, the Reverend Moon, and Madalyn Murray O'Hair) there is no "establishment of religion" and "there cannot be a meaningful perception of one." *O'Hair v. Andrus*, 613 F.2d 931 (1979) at 934.

in banning religious speech and activity from public property, that showing would be entirely *immaterial* where we are talking about a public forum.[18] Any other approach would threaten to "thwart first amendment values underlying communication and religious freedom." *O'Hair v. Andrus, supra,* at 937.

B. The Court Correctly Ruled That Missouri's "Compelling State Interest" in Strict Separation of Church and State Did Not Justify the Burdens Placed on the Students' Rights of Free Speech, Free Exercise of Religion, and Equal Access to a Public Forum.

The University contends that the State of Missouri is very concerned about keeping religious teaching and worship off of its University campuses. How do we know that this is true? Has the state legislature issued a resolution on the subject? What about the state's interest in *freedom of speech* and *freedom of religion?* The University, which has the burden of establishing such compelling state interest, was unable to convince the Eighth Circuit that the State of Missouri really had a compelling interest in keeping religion off campus (Appendix at A-12, footnote 7). The University cites the constitutional provisions prohibiting a transfer of funds from the State Treasury for religious purposes. But since this case does not involve a transfer of funds, the University asks the Court to use its imagination in deciding that the State of Missouri opposes tolerating religion on campus.

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18. The D. C. Circuit rejected arguments based on the establishment clause in *O'Hair v. Andrus, supra,* because the national mall was a public forum. The Supreme Court of Delaware rejected arguments based on the Establishment Clause and provisions of the University Charter in *Keegan, supra,* partly because the commons area of the dormitory was a place in which "the University permits every other student activity." 349 A.2d 14, at 17-18.

But even if we were to assume as true that the State were very, very concerned about keeping religion off campus, for whatever reason, any provision of state law requiring the restrictions set forth in the regulation in this case would have to be struck down in the face of the first amendment. No state is entitled to legislate away fundamental first amendment freedoms simply by asserting a "compelling state interest."[19] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbet v. Verner*, 374 U.S. 398 (1963); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1978), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S. 981 (1978).

C. The Court Correctly Held That the University Regulation in Question Violated the Establishment Clause As Well As the Free Exercise Clause.

The Eighth Circuit very astutely found that, where a public forum exists, any attempt to censor out religious speech on the basis of content is not only *not required* by the Establishment Clause, but also actually *violates* the Establishment Clause because it has a *primary effect* of inhibiting religion (Appendix at A-14).

The Supreme Court for a number of years has recognized that a state regulation which is hostile to traditional forms of religious exercise (*e.g.*, prayer, Bible reading) may violate the Establishment Clause as well as the Free Exercise Clause where the primary effect of the regulation is to inhibit traditional forms of religious exercise while advancing secularism and other movements which oppose

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19. The extreme viewpoint that state interest in separating church and state overrides state interest in accommodating the free exercise of religion could lead to the absurd conclusion that the state can deny voluntary religious observance in state penitentiaries and state hospitals.

or replace traditional forms of religion.[20] The Eighth Circuit has now also recognized that the government has no business advancing the cause of secularism any more than the cause of any traditional religion. The government must remain scrupulously neutral as to these matters of conscience and individual belief. The best way for the government to remain neutral is to allow all forms of such expression. *O'Hair v. Andrus, supra.*

In addition to the requirement of government neutrality with regard to religious matters, it is essential that the effect of the regulation is not to excessively entangle the state in religion. Our society today contains many religious and quasi-religious movements which are not immediately identified as "religions" by administrators because these movements do not have the labels we traditionally associate with religion. Examples of such movements are eastern mysticism, transcendental meditation, yoga, witchcraft, humanism, and secularism.[21] An administrator is likely to screen out and prohibit a Roman Catholic mass or a Baptist Student Union prayer meeting, while permitting a meeting with regard to transcendental meditation or humanism.[22] With new and different religions

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20. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), Mr. Justice Black noted that religions "based on a belief in the existence of God" are not entitled to more protection than religions "founded on different beliefs." *Id.*, at 495. Likewise, they are not entitled to less. That is the reason for the inclusion in the *Lemon - Walz* three prong test that no state regulation can have a primary effect inhibiting religion. See also *Abington School District v. Schempp*, 374 U.S. 203 (1961) at 299, where the Court discussed the fact that the state cannot be hostile to religion; and a similar discussion in *Epperson v. Arkansas*, 393 U.S. 97 (1968) at 103-104, about the requirement of neutrality between religion and non-religion.

21. *Torcaso v. Watkins*, 367 U.S. 488 (1961), footnote 11, at 495; *O'Hair v. Andrus, supra*, footnote 19, at 935.

22. It is unclear what action, if any, UMKC would have taken prior to the invalidation of the regulation if a group of students had invited Madalyn Murray O'Hair to speak on campus

(Continued on following page)

and movements appearing regularly in American culture today, a very formidable task of censorship is forced upon the university administrator, entangling the university in extremely difficult religious definition and distinction. The Eighth Circuit Decision in this case wisely avoids establishment problems created by such entanglement, and further avoids the establishment problems created by favoritism and lack of neutrality.

D. The Fact That the Students Applied for the Right to Use Space on a Regular Basis Is Immaterial.

The University attempts to make much of the fact that the students in this case desire regular, rather than just occasional, use of the facilities. Of course, the Eighth Circuit summarily dismissed this argument since the regulation in question did not permit *any* meetings, even where requested on an occasional basis (Appendix at A-17).

The University relies upon cases where the right to use public facilities for religious purposes was upheld, but in which, in dicta, the courts expressed concern about the possible "establishment" effect of permitting regular meetings.[23]

Footnote continued—
for the purpose of teaching her "gospel." Under the ruling of the Eighth Circuit in this case, it is clear she could not be forbidden to speak, and the same would apply to Billy Graham. The University does not need to concern itself with such distinctions.

In the March, 1978, issue of *Educational Leadership*, James K. Uphoff argues that Ethical Culture, secularism, humanism, and scientism have all become religions in the broad sense.

See also Whitehead and Conlan, *The Establishment of Secular Humanism as a Violation of the Establishment Clause*, 10 Texas Tech. L. Rev. 1 (1978).

23. *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir., 1979), at 939 (MacKinnon, J., concurring); *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 520 P.2d 514 (En Banc 1974), at 517.

What the courts have really been concerned about in these cases, however, is not the distinction between regular and irregular meetings, but rather the distinction between equal availability and pre-emption. If a facility can accommodate all groups desiring to use it, religious or non-religious, and if all such groups are permitted, on an equal basis, without favoritism, to schedule regular meetings, there is no pre-emption of facilities by any group. Student-Respondents concede that if a relatively small amount of available space were pre-empted by a religious group to the exclusion of other groups, there could be an "establishment" of religion. That is not the case here. The forum is now open. The forum is available on a like basis to all, and the record fails to indicate any lack of ability to accommodate all groups, whether or not desiring regular meetings. There can, therefore, be no establishment.[24]

CONCLUSION

This Court has never chosen to review a case presenting the exact issues of this case. There is no reason to do so now. As a result of the Eighth Circuit opinion in this matter, it is now settled that a public university may not discriminatorily refuse access to facilities on the ground that the proposed use includes "religious teaching" or "religious worship." This is a healthy development, and it is one which will improve the educational and cultural climate of the University. Students attending the University have the right to expect that religious ideas will compete for their attention and allegiance along with all other ideas. The first amendment includes the right to hear as well as the right to speak. *Brooks v. Auburn Uni-*

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24. See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

versity, 412 F.2d 1171, 1173 (5th Cir. 1969); *James v. Nelson*, 349 F. Supp. 1061 (N.D. Ill., 1972). Restriction and suppression of student-initiated religious teaching and religious worship would, in the end, tend only to impoverish the opportunities for inquiry and development which are now offered the students.

For all of the above reasons, Student-Respondents respectfully request that the Petition for Certiorari be denied, and further request that counsel for Student-Respondents, who have expended approximately 26 hours preparing the response to the Petition for Certiorari, be compensated by an award of attorney's fees pursuant to 42 U.S.C. Section 1988 at the rate of $70.00 per hour, or in an amount to be set by the Court.

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No. 80-689

In the Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, et al.,
Petitioners,

vs.

CLARK VINCENT, et al.,
Respondents.

MOTION OF BIBLE STUDY, [redacted] FOR LEAVE TO FILE BRIEF AMICUS CURIAE [redacted]

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November 26, 1980

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No. 80-689

In the Supreme Court of the United States

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GARY E. WIDMAR, et al.,
Petitioners,

vs.

CLARK VINCENT, et al.,
Respondents.

MOTION OF BIBLE STUDY,
a student organization at the University of Missouri at St. Louis, et al.
FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

Comes now BIBLE STUDY, a recognized student organization of the University of Missouri at St. Louis, and moves, pursuant to Supreme Court Rule 42, for leave to file the accompanying brief Amicus Curiae in opposition to Petitioner's Petition for Certiorari.

In support of this motion counsel for Amicus Curiae states that she has obtained the written consent of counsel for Respondents to file this brief, but that counsel for

Petitioners has advised the undersigned by letter that "it is the policy of our office [Office of General Counsel, University of Missouri] not to consent to the filing of Amicus briefs in cases to which the University of Missouri is a party", and accordingly consent was denied. Therefore, the Court's permission is required to file the accompanying brief.

Bible Study, by leave of the Court of Appeals, filed a brief and a reply brief Amici Curiae with Cornerstone and the Christian Legal Society, religiously oriented student organizations at the University of Missouri at Kansas City, in the court below.

Bible Study has been an officially recognized student organization since at least 1976. The organization is distinguishable from Cornerstone and other student religious organizations in that its activities consist almost exclusively of reading the Bible and exchanging individual interpretations of the meaning of the passages under study. It encourages members of all religious faiths and those of no religious faith to join in its meetings. The members of Bible Study believe that all students can benefit from a better knowledge of the Bible which evolves from the self-teaching which occurs at their meetings.

Between September 28, 1978, and August 21, 1980, Bible Study made repeated requests of the University, its Curators, officers and agents, for permission to use the meeting rooms in the University Center for their meetings. Notwithstanding the University's custom of routinely providing facilities for meetings of officially recognized student organizations, the requests made by Bible Study from September 28, 1978, through August 21, 1980, were denied. Similar requests made by Bible Study prior to September 28, 1978, were approved. The only reason given to the

members of Bible Study for denial of their requests for meeting facilities was that the meeting involved religious teaching and worship contrary to University regulations.

On August 4, 1980, the United States Court of Appeals for the Eighth Circuit ruled that the regulation 4.0314.0107, was invalid. In view of this ruling, Bible Study at the beginning of the academic year in late August submitted a written request to the University for facilities for weekly meetings in accordance with established procedures for submission of such requests. The request was denied on the basis that the Court of Appeals decision was not final.

On September 2, 1980, Bible Study sent telegrams to the members of the Board of Curators and officers of the University again requesting permission to meet in the University Center on September 4, 1980. The telegrams also advised that if the request for meeting space were denied, the members of Bible Study would direct counsel to seek a Temporary Restraining Order.

On September 3, 1980, the Board of Curators adopted a resolution suspending the regulation under review pending final resolution of the issues in this case.

Bible Study's rights to equal facilities for continuation of its study and self-teaching is inextricably entwined in the outcome of this case in this Court. As set forth above, Bible Study's missions and activities differ from those of other student religious organizations because it does not sponsor worship services. Its interests may not be adequately represented by the individual students from another campus who are parties to this action. Nevertheless, it will be bound by any ruling made in this Court, and therefore respectfully requests that leave be granted for filing of the accompanying brief.

Cornerstone and the Christian Legal Society at the University of Missouri at Kansas City, two religiously oriented student organizations, join Bible Study in this motion and accompanying brief.

Respectfully submitted,

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November 26, 1980

BRIEF IN OPPOSITION

STATEMENT OF INTEREST OF AMICI CURIAE

Bible Study is an officially organized student organization at the St. Louis campus of the University of Missouri. It desires a meeting room in the University Center for its weekly meetings. At such meetings a portion of the King James version of the Bible, usually a book, is read by those in attendance. One reader reads aloud and then explains to the others what the portion read means to him. Others then offer their own understanding and interpretation.

Bible Study meetings are open to all who wish to attend. By virtue of the University's ban on religious teaching, it has been forced to conduct its meetings at a private home located near the campus. The tone of its meetings would be more like a seminar than a worship service.

Now that the University is no longer preventing religious teaching by student organizations on campus pending the disposition of this case, Bible Study hopes that more members of the University community will attend this meeting. It has no objection to individuals attending its meeting who desire to learn about the Bible for literary, historical or philosophical reasons, but it hopes that such individuals as they come to understand the Bible better will find it a source of religious faith.

Cornerstone and the Christian Legal Society at the University of Missouri at Kansas City, two religiously oriented student organizations, join Bible Study in this brief.

STATEMENT OF THE CASE

The University of Missouri,[1] a state university and the oldest land-grant college west of the Mississippi River, has four campuses - the original campus in Columbia, another campus at Rolla, and campuses at Kansas City and St. Louis which are commuter oriented, rather than residential as is the case with the first two campuses.

On each campus a large number of student groups exist with a wide variety of special areas of interest. Ethnic organizations, such as Jewish college students, Mexican-American students, and the Afro-American Student Union, focus on issues and concerns of their particular ethnic heritage. There are also political organizations such as Young Socialist Alliance, Women's Union and Young Democrats. There are other groups such as the Fencing Club, Bridge Club, Chess Club, Karate Club, Mortar Board, Omicron Delta Kappa, etc. In the words of a University official, "These groups are formed by students to provide another dimension to the student's life on campus - the extra and co-curricular experience." See memorandum of Assistant Dean Parker quoted in n. 1 of the Slip Opinion, petition Appendix, A-3.

As described in the University bulletin, "Through various organizations, boards and committees, cultural, social, educational and recreational programming is provided. The aim is to make student free time activity, a cooperative aid to academic study. . . . Student programs in the University Center often include lectures, symposia, con-

---

1. The petitioners are officials and Curators of the University of Missouri and will be referred to as the University of Missouri or the University. The respondents are students at the University's branch in Kansas City which is often referred to as UMKC.

certs, discussions, receptions, chess and bridge tournaments, as well as other events . . .".

Notwithstanding the high value which the University places on the extra-curricular activities promoted by student organizations, the University has a tradition of denying facilities to students and organizations advocating points of view which the University finds objectionable. Frequently individuals and organizations in the University community have had to turn to the courts to obtain permission to express views on campus which the University has proscribed. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 671, this Court reminded the University that the ". . . First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . ." and prevented the University from expelling a graduate student for distributing a newspaper on campus which contained a political cartoon and story which the University considered "indecent". In *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir., 1977), cert. denied, 434 U.S. 108, reh. denied, 435 U.S. 981, the Court of Appeals held that the University was prevented from withholding official recognition of a student organization because the University disagreed with the views which the organization would express. It noted that "it is . . . axiomatic that the First Amendment must flourish as much in the academic setting as elsewhere . . . to invoke censorship in an academic environment is hardly the recognition of a healthy democratic society." Most recently in *University of Missouri v. Dalton*, 456 F.Supp. 985, the district court found that the University violated the First Amendment and the Equal Protection clause of the Fourteenth Amendment by denying meeting rooms to a faculty organization which advocated changing the Missouri laws on collective bargaining by public employees.

In the present case the expression which the University finds objectionable is "religious worship" and "religious teaching". University Regulation 4.0314.0107 provides that "No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. . . .".[2] The text of the regulation goes on to provide as the rationale for the regulation: "The general prohibition against use of University buildings and grounds for religious worship or teaching is a policy required, in the opinion of the Board Curators, by the Constitution and Laws of the State and is not open to any other construction."

The regulation does permit the offering of prayer at public functions held in the University facilities, and Regulation 4.0314.0108 provides that "regular chapels established on the university grounds may be used for religious services but not for regular recurring services of any group. . .". The University does not have chapels on its Kansas City and St. Louis campuses.

As stated by the court below:

> The University's enforcement of this regulation began with Cornerstone's January 5, 1977, request to continue its use of a particular lecture hall for Saturday night meetings during the spring term. On the University's request form, Cornerstone stated that its purpose was to "promote a knowledge of Jesus Christ among students" and listed the subject of the proposed meetings to be "various topics relating to Christianity and the Bible." The request stated that the meetings and events would be open to the public, no University

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2. The full text of Regulations 1.0314.0107-.0108 is set forth in the Petition at pp. 3-4, and in the opinion below, slip opinion 5-6, petition Appendix, A-4-A-5.

funds would be used, no admission would be charged and no donations would be solicited. The Dean of Students met with Cornerstone representatives and requested more information regarding the nature and purpose of their meetings. In response, Cornerstone's attorney submitted a letter containing this direct and candid description:

> Typical Cornerstone meetings in University facilities usually include the following:
>
> 1. The offering of prayer;
>
> 2. The singing of hymns in praise and thanksgiving;
>
> 3. The public reading of scripture;
>
> 4. The sharing of personal views and experiences (in relation to God) by various persons;
>
> 5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and
>
> 6. An invitation to the interested to meet for a personal discussion.
>
> As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.
>
> Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there

> is no doubt that worship is an important part of the general atmosphere. There also is no doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.
>
> There are no collections or solicitations of funds at these meetings, and there are no specific rituals or practices of any particular denomination or sect.

Eleven student members of Cornerstone initiated this action in the district court, alleging that the University, by denying facilities for meetings, violated their rights to free exercise of religion, freedom of speech and equal protection of the law.

The case was submitted to the district court on cross motions for summary judgment based on stipulated facts. The district court granted summary judgment in favor of the University. The court found "that the university's present ban on religious services in its buildings is *required* by the establishment clause". 480 F.Supp. 907, 916, petition Appendix, A-42, emphasis added. With respect to the free speech claims the court concluded that "speech with religious content cannot be treated the same as any other form of speech", id. at 918, A-47, and that "secular intellectual liberties" were entitled to a higher degree of protection than "religious activity", id. at 918, A-47.

The court of appeals reversed. It held:

> UMKC has the right, as do all public universities, to recognize student groups that seek to associate for the advancement of any and all ideas. It has exer-

cised this right and has opened certain of its facilities to recognized student groups for lectures, discussions, symposiums, meetings, events and programs. But UMKC has denied access to these facilities to one such recognized student group based solely on its conclusion that the group's meetings include either religious worship or religious teaching. This denial clearly burdens the constitutional rights of the group's members and is not justified by a compelling state interest in avoiding an establishment of religion. A neutral accommodation of the many student groups active at UMKC would not constitute an establishment of religion even though some student groups may use the University's facilities for religious worship or religious teaching. Therefore, UMKC's regulation No. 4.0314.0107, which prohibits religious worship and religious teaching in the University's buildings or on its grounds, is not required by the Establishment Clause. Because of the burden it imposes on the rights guaranteed to the appellants by the First and Fourteenth Amendments of the federal Constitution, the regulation is invalid.

REASONS FOR DENYING THE WRIT

1. The holding of the Court of Appeals voiding the University of Missouri's content-based regulation restricting expression is entirely consistent with, and indeed mandated by, the decisions of this Court. Last term the Court again recognized: "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Carey v. Brown,* ..... U.S. ....., 65 L. Ed. 2d 263, 271, quoting *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95-96. The right of speakers and

listeners to be free of government imposed content-based restrictions on expression in public forums is guaranteed by the Equal Protection clause of the Fourteenth Amendment, *Carey v. Brown*, supra at 65 L. Ed. 2d 270-271; *Police Department of Chicago v. Mosley*, supra; *Cox v. Louisiana*, 379 U.S. 536, 581 (Black, J., concurring). That right of speakers and listeners is also guaranteed by the First Amendment, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 520; see also, concurring opinion of Mr. Justice Stewart in *Carey v. Brown*, supra 65 L. Ed. 2d 276-277.

It is precisely a content-based restriction on the use of its public facilities which the University of Missouri seeks to enforce by the regulation that is in issue in this case. The University makes facilities available routinely to the various campus organizations. Ordinarily the University does not seek to proscribe the expression of campus groups using its facilities; however, the University does not allow expression which the University considers to be "religious worship" or "religious teaching". Such a distinction cannot constitutionally stand. It is immaterial that all "religious worship" or "religious teaching" is proscribed since "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison v. Public Serv. Comm'n*, ... U.S. ....., 65 L. Ed. 2d 319, 328.

2. This Court has consistently afforded religious expression the highest degree of protection from government interference. In so doing it has relied on the Free Exercise clause of the First Amendment, *Cantwell v. Connecticut*, 310 U.S. 296; the Speech clause of the First Amendment, *Fowler v. Rhode Island*, 345 U.S. 67; *Murdock v. Pennsylvania*, 319 U.S. 105; and the Equal Protection clause of the Fourteenth Amendment, *Niemotko v. Maryland*, 340

U.S. 268, and the concurring opinion of Mr. Justice Frankfurter in *Fowler v. Rhode Island*, supra 345 U.S. at 70.

In short, this Court has always afforded religious expression at least the same degree of protection that it has provided to political, economic and cultural expression, *NAACP v. Alabama*, 357 U.S. 449, 460-461. On the facts of the present case a decision upholding the University regulation would be a departure from such prior decisions and would represent the first time this Court has ever found that religious expression is entitled to less constitutional protection than expression with non-religious content.

3. The case presents no new Establishment clause issues. The University in its statement of the questions presented for its second question presents the issue as being whether the Free Exercise and Speech clauses of the First Amendment take precedence over the Establishment clause of the First Amendment. The Court of Appeals found no conflict between the requirements of the Establishment clause and its holding that the University may not discriminate against religious expression with respect to access to its public facilities. Thus, the University presents a false issue to this Court. What the Court of Appeals did find was that the Establishment clause as well as the other provisions of the First Amendment and the Equal Protection clause required equal treatment of religious and non-religious speech.

In analyzing the Establishment clause issues in the case the court applied the standard three-prong test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, which this Court has often articulated. It agreed with the district court that, "A [neutral] university policy that permitted *any* student group to meet in university - owned buildings for *any* purpose would aid all student groups, regardless

of religious affiliation and would, therefore, reflect a clear secular purpose. In addition, such a policy would make no distinction between groups for their purposes, entanglement with religion would be completely avoided." Slip Op. 15-16, petition Appendix A-12, quoting 408 F.Supp. at 914, petitioner Appendix A-39 (emphasis in original).

The Court of Appeals also found that a policy which put religious groups on an equal footing with non-religious groups with respect to use of University facilities:

> . . . would have the primary effect of advancing the University's admittedly secular purpose - to develop students' "social and cultural awareness as well as [their] intellectual curiosity." It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular. It would no more commit the University, its administration or its faculty to religious goals than they are now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, the Young Democrats or the Women's Union.
>
> Furthermore, a neutral policy would not be an "establishment" as that term was understood by the framers of the First Amendment. "[F]or the men who wrote the Religion Clauses * * * the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, supra, 397 U.S. at 668. Under a neutral policy, the University would not sponsor religious worship or teaching; sponsorship would lie with the recognized student groups. Financial support would be minimal. Finally, there would be no active involvement of the sovereign because the University's role would be limited to de-

termining the time, place and manner of the event and would not extend to approval or disapproval of content.

In contrast with a neutral policy, UMKC's current regulation has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion. *Lemon v. Kurtzman*, supra, 403 U.S. at 612-613. The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups.

Slip Op. 15-16, Petition Appendix A-13-14.

For the Court of Appeals to have ruled otherwise would by necessity mean that no public facilities could be used for religious expression consistent with the Establishment clause. Such a holding would come as a shock to other public universities, not to mention cities and counties, which allow religious organizations the same access to meeting facilities as other groups. It would require a government hostility to religion unprecedented in a free society.

This Court has never found that the Establishment clause conflicts with the First Amendment freedoms of speech and assembly. The fact that the state permits religious activities in its streets - *Kunz v. New York*, 340 U.S. 290, parks - *Niemotko v. Maryland*, 340 U.S. 268, or in its other public forums does not present a legitimate Establishment clause issue.

4. Missouri's interest in requiring strict separation of church and state does not validate the University's policy of discriminating against religious expression.

The Curators of the University of Missouri assert that the Missouri Constitution requires the policy of denying access to University facilities for religious expression. However, the Curators read the Missouri Constitution in a way which finds no support in the reported state cases, and in a way which is not clearly mandated by any demonstrable textual provisions of the State Constitution. While it is true that the Missouri Constitution fosters a strict policy of separating church and state, stricter in some instances than the Establishment clause requires, it simply is not a fair reading of the State Constitution or its judicial gloss to hold that a public facility can never be used for religious teaching or worship.[3]

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3. Of the four state cases cited by the petitioners, three involve aid to elementary and secondary schools: *Harfst v. Hoegen*, 163 S.W. 2d 609 (Mo.), held that a parish religious school taken over by the public school district was on the facts of the case, still operated as a religious school; *Paster v. Tussey*, 512 S.W. 2d 97 (Mo.), cert. denied, 419 U.S. 1111, held that a state statutory scheme which authorized the "loaning" of textbooks to students and teachers attending private elementary and secondary schools was unconstitutional; and, *Mallory v. Barrera*, 544 S.W. 2d 556 (Mo.), held that the state could not administer federal funds intended for private school students.

In the other state case cited by the University, *Americans United v. Rogers*, 538 S.W. 2d 711 (Mo.), cert. denied, 429 U.S. 1029, the Court *upheld* a tuition grant program for students attending private colleges and universities. The Court stated, 538 S.W. 2d at 722:

> In doing so, we take solace in the fact that that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: "Institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background in faculty and students."

The University's own policy of allowing some religious worship and teaching in the single chapel which the University maintains on its Columbia campus, plus the University's recognition that "[n]o regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held at University facilities" suggests that it is not the State Constitution which the University is protecting by its regulation, but the Curators' own policy choice concerning religious activities.

In any event, whether the asserted state interest is constitutional or merely administrative policy, it does not support the denial of what would otherwise be regarded as freedoms secured by the Federal Constitution. As this Court noted in *Cantwell v. Connecticut*, 310 U.S. 296, 308, - ". . . the state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

5. The frequency of religious uses of the University facilities should not be at issue in the present case. The University asserts in its first and fourth Questions Presented that "regular" religious uses of its facilities are at issue. The University has modified its position since the Court of Appeals where its object was to suppress all religious use of its facilities and not merely "regular" uses.

The word regular is not defined in the context of this case, but since the University provides its facilities for hundreds, if not thousands, of different meetings in the course of an academic year, we fail to see the materiality of the frequency a group proposes to meet. The issue might be different if the question concerned a religious group which attempted to monopolize the only available auditorium in a community every Sunday for

its weekly service, but in the hustle and bustle of University activities, limiting religious uses alone to non-regular uses appears trivial and arbitrary. The University has made no claim that a limitation on religious uses is necessary to make facilities available for competing demands and no reason is advanced why religious organizations should be restricted in the number of uses they can make of University facilities when other groups are not similarly limited. Since the University has full authority to impose reasonable restrictions concerning time, place and manner on the use of its facilities, there is no reason why religious activities should be treated differently than other activities.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 80-689

IN THE

Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, et al.,

Petitioners,

v.

CLARK VINCENT, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN OPPOSITION TO GRANTING CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN OPPOSITION TO GRANTING CERTIORARI

The Center for Law and Religious Freedom of the Christian Legal Society respectfully moves the Court, pursuant to Rule 42 of its Rules, for leave to file the accompanying brief amicus curiae in opposition to the petition for the grant of a writ of certiorari filed in the above captioned matter.

The consent of the parties to the filing of the attached brief has been sought by the moving party. However, while the respondents gave their consent, the petitioner refused such consent. Amicus, accordingly, proceeds by this motion.

As set out in the statement of Interest of Amicus Curiae found below, amicus feels that it is uniquely qualified to assist the Court in deciding the vital issues presented by the petition herein. Those issues touch upon core values of religious liberty which are a vital concern to amicus. It is not just the rights of this small group of students which are at issue in this case. Amicus is concerned about the ramifications of this case upon voluntary student initiated religious activity throughout this country. Unless the opinion of the Court of Appeals is upheld, this case will have drastic consequences for traditional student freedoms.

Amicus believes that it can add its national perspective to the issues in this case. Moreover, it will address issues which have not been adequately presented by the parties to date. These points include the nature of the religious command and obligation which motivates these students, this Court's company town precedents and its doctrine of accommodating neutrality in the Religion Clauses context.

Therefore, amicus strongly supports the opposition to the petition for certiorari and urges that this Court accept

and consider its accompanying brief, which describes and develops the bases and reasons for that support.

Respectfully submitted,

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Dated: November 25, 1980

BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN OPPOSITION TO GRANTING OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys and law students Today it includes over 5,000 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect, promote, assure and enhance the freedom of Christians in the exercise of their faith which is guaranteed by the United States Constitution. The Center attempts to marshal the necessary legal skills and resources to enable the Christian Legal Society to act where the rights of Christians to exercise and express their faith are being improperly infringed. The Center's resources include, for example, prominent constitutional attorneys and an awareness of national trends. In pursuit of its goals, the Center has held numerous regional or national conferences providing continuing legal education by experts in fields such as constitutional law, federal practice and procedure, non-profit organizations, state and federal taxation, recent case developments, etc. The Center's national membership and professional resources thus enable it to focus attention upon unconstitutional incursions on religious freedom that would otherwise go unrecognized.

The Court in this case is faced with difficult and complex issues arising under various provisions of the First Amendment to the United States Constitution as applied to state-owned University property . Counsel for the Center participated as amicus curiae in the leading reported decision which addressed similar issues: *Keegan v. University of Delaware,* 349 A. 2d 14, 15 (Del. 1975) *cert. denied,* 424 U. S. 934 (1976). Moreover, the Center has lent its own constitutional expertise to various other legal, *see, e.g.,*

NLRB v. Catholic Bishop of Chicago, 440 U. S. 490, 491 (1979), and administrative proceedings. *See, e.g.*, Subcommittee On Oversight Of The U. S. House of Representatives Committee On Ways And Means, "Staff Report On IRS's Proposed Revenue Procedure Regarding The Tax Exempt Status Of Private Schools," 96th Cong., 1st Sess. (August 31, 1979), at 5-6. The Center believes this expertise will be of assistance to the Court. This brief also is filed to provide the Court with the views of amicus on aspects of the Religion Clauses which amicus believes have not been adequately addressed by the parties.

STATEMENT OF THE CASE

This is a unique student rights case in which this Court must decide a conflict between adult individuals and the State. The students in question are adults seeking to voluntarily exercise their religion. Neither coercion nor state sponsorship of religious activity is involved. Instead, these students seek to use facilities on the same basis as other student groups.

The University of Missouri-Kansas City is also the equivalent of a company town for its students. It is a home away from home, a complete social community for its resident students, but one where they apparently cannot share and experience their religious faith. The University is truly a company town. Thousands of adult students live there 24 hours a day on a typical far-flung university campus. These adults live their whole lives there. They eat, sleep, study, socialize and recreate there. Their town consists of residential buildings, streets, public and private areas, etc. The university is a "micro-society" for its students. Seldom if ever do they leave campus.

Religious belief and activity permeate all aspects of the lives of these students. (Chess affidavit ¶ 4, A31-35) Accordingly, since 1972 or 1973, Christian students have fully exercised the religious dimension of their lives in

their campus community. (*Id.* ¶ 6) This religious belief, practice and association cannot be compartmentalized or limited to a one hour worship service on Sunday. Instead plaintiffs and other Christian students, out of deeply held religious faith, have associated together in meetings where they share their faith and study how Christian teaching relates to their daily lives. This association of Christian students in a religious context is a basic and fundamental part of their lives. Christian students also have sought to explain to other students principles from *The Holy Bible* and the teachings of Jesus Christ. (*Id.* ¶¶ 3-7) While Christian students in the past have always been able to live their lives fully at the University, the defendants, by means of their regulation, have attempted to require them to artificially segment out or limit the religious dimension of their total lives. Religiously motivated students are not entitled to use university facilities on an equal basis, or on a "first-come, first-served" basis, with no usage restrictions, as are all other students.

There can be no question that the University is interfering with the exercise by plaintiffs of religious beliefs, sincerely held by them. Consequently, some students simply have had to abandon religious association. Meetings have been banned which are designed to give a Biblical framework to student life and to explain how students should deal with the everyday decisions which face them. Requiring these students to go off campus, where they never before have traveled, is deterring them in the exercise of their faith and is hindering them in communicating their religious beliefs with others. (*Id.* ¶ 11) While radical student groups can meet to discuss tearing down or violently overthrowing our constitutional form of government, these Christian students cannot meet to discuss the Sermon on the Mount (*The Holy Bible: Matthew* 5-7) or how our Judeo-Christian tradition teaches them to be good citizens.

ARGUMENT

Plaintiffs Proved a Direct and Substantial Infringement of Their Religious Liberties by the Actions of the Defendants and the Appeals Court Was Correct in Finding as a Matter of Law That No Compelling State Interest Outweighed the Vital Religious Liberties at Issue.

A. The Religious Liberties at Issue Include the Rights of Religious Association, Evangelization and Speech.

As the facts undisputably established, these adults seek to share with others the good news of their religious faith and to associate frequently with like minded students for religious purposes. For 2,000 years Christians have been trying to share their faith in the communities where they live. *See The Holy Bible: Acts Of The Apostles* 2:14-41; 5:42 (King James). These same Christians have been following the great commission given them by Jesus Christ: to go out and share his message. *The Holy Bible: Matthew* 28:19-20; *Mark* 16:15 (King James). Their faith requires them to be witnesses to the living Jesus Christ . *The Holy Bible: Acts Of The Apostles* 1:8 (King James). In other words, they must witness and evangelize others as a matter of religious obligation. For 2,000 years Christians also have been worshipping and associating in their homes and in their home communities. *See The Holy Bible: Acts Of The Apostles* 2:46 (King James). These commands are central to plaintiffs' lives, they integrate and permeate their lives.

The free exercise clause of the First Amendment is a shield against governmental interference with these historical religious practices. That clause has been called "the favored child of the First Amendment."[1] Plaintiffs' religious activity is at the very center of the practices protected by the free exercise clause. For example, as long

1. Pfeffer, "The Supremacy Of Free Exercise." 61 *Geo. L. J.* 1115, 1142 (1973).

ago as 1943, this Court said in *Murdock v. Pennsylvania*, 319 U. S. 105, 110:

> spreading one's religious beliefs or preaching the Gospel . . . through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types.[2]

Significantly, the Court there found that—

> [t]his form of religious activity occupies the same high estate under the First Amendment as do worship in the Churches and preaching from the pulpits.

Id. at 109. Moreover, this Court in analogous situations has repeatedly affirmed the right of persons freely to disseminate religious doctrine in their communities in an effort at the communication of religious ideas. *See Largent v. Texas*, 318 U. S. 418 (1943); *Jamison v. Texas*, 318 U. S. 413 (1943); *Cantwell v. Connecticut*, 310 U. S. 296 (1940). Similarly, lower courts recently have upheld the rights of individuals to distribute religious literature and to proselytize in residential areas as well as on city streets. *See, e.g., Cherris v. Amundson*, 460 F. Supp. 326 (E. D. La. 1978); *Smith v. City of Manchester*, 460 F. Supp. 30 (E. D. Tenn. 1978). Courts even have held that individuals have the right to fully exercise their religion in federal buildings, *U. S. v. Boesewetter*, 463 F. Supp. 370 (D. D. C. 1978), at a municipal airport, *International Society For Krishna Consciousness, Inc. v. Collins*, 452 F. Supp. 1007 (S. D. Tex. 1977), and at a state fair, *International Society for Krishna Consciousness, Inc. v. Bowen*, 600 F. 2d 667 *cert. denied*, 444 U. S. 963 (1979).

The facts of this case bear a significant analogy to the above decisions, both because of the religious liberties involved and the geographic location of their exercise. In those cases religious liberty was exercised in public places, in the community. There certainly is a strong resemblance

2. *See The Holy Bible: Acts Of The Apostles* 20:20 (King James).

to municipal airports, parks, public buildings and residential areas and this university which serves as a "micro-society" for plaintiffs. The defendant university is undeniably a self-contained "city." First Amendment rights are fully available in the "functional equivalents" of cities. *Marsh v. Alabama*, 326 U. S. 501 (1946); *Tucker v. Texas*, 326 U. S. 517 (1946); *Lloyd Corp., Ltd. v. Tanner*, 407 U. S. 551 (1972).[3] Relying upon this statement of the law, the leading decision in *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975), *cert. denied* 424 U. S. 934 (1976), recognized a vital fact of university life. Analyzing this Court's company town cases, that court said—

> In *Tucker v. Texas*, 326 U. S. 517 (1946), a freedom of press and religion case, the Supreme Court upheld the right of an ordained minister of Jehovah's witnesses to distribute religious literature in a village owned by the United States, notwithstanding a request to leave by the manager of the village pursuant to his purported authority by federal regulation and Texas criminal law. The Court noted the village "had the characteristics of a typical American town." The case thus has similarities to the University owned dormitory situation here.

Id. at 18. Merely because the university serves an educational function, it should not be immunized from the full scope of the free exercise clause because it is the functional equivalent of a town.[4] In *Healy v. James*, 408 U. S. 169, 180 (1972), this Court noted that—

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3. The university has all the characteristics of the company towns found in *Marsh* and *Tucker*, residential buildings, streets, etc. 326 U. S. 502-03.

4. Paraphrasing the words of Justice Black in *Marsh v. Alabama, supra*, at 508, it can certainly be said of the multitudes in higher education throughout this country: "Many people in the united States live in [universities]. These people, just as residents of municipalities, are free-citizens of their State and country. . . . There is no more reason for depriving these people of the liberties

> [S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate." . . . Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Because the defendant university is a 24 hour community for these students they should not be forced to artificially segment out the religious dimension of their lives from all other aspects of their human activity. The university is the home community for these Christian students for four years of their lives. They cannot be expected to deny and compartmentalize their Christianity for these vital four years. The Court of Appeals recognized these facts and thus gave the proper weight to the historic and fundamental religious liberties at issue in this case.

B. A Direct and Substantial Burden Has Been Placed on the Exercise of Religious Liberty.

If the "effect" of governmental action is directly, indirectly or incidentally to impede religious practice, this violates the free exercise clause. *Wisconsin v. Yoder,* 406 U. S. 205, 220 (1972); *Sherbert v. Verner,* 374 U. S. 398, 404 (1963). The facts set out above establish that the religious liberty of plaintiffs was significantly affected. These students have been hindered in communicating religious beliefs, in associating and in obeying the commands of *The Holy Bible.* Many students are simply no longer able to obey religious obligations.

The constitutional significance of this denial of interpersonal communication was discussed in the leading stu-

4. (Cont'd.)

guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." (footnotes omitted)

dent rights case of *Tinker v. Des Moines School District*, 393 U. S. 503 (1969). This Court there recognized that "personal intercommunication among the students . . . is . . . an inevitable part of the process of attending school; it is also an important part of the educational process." *Id.* at 512. Personal intercommunication extends from the classroom into the cafeteria, onto the playing fields and throughout a campus. *Id.* at 512-13. Education occurs not just in a classroom but by means of intercommunication during the total experience of university life.[5] *Healy v. James, supra,* reemphasized the importance of interpersonal communication on campus. The defendants there argued that the students involved could still meet as a group and distribute material off campus. *Id.* at 182-83. But this Court found that—

> Denial of official recognition posed serious problems for the organization's existence and growth . . . most importantly—non-recognition barred them from using campus facilities for holding meetings.

Id. at 176. See *id.* at 181-83. *Healy* is extremely important to the case at bar because of its recognition of the serious problems for an organization's continued existence and growth which arise from the denial of the opportunity to use on-campus facilities to hold meetings. In *Gay Students v. Bonner*, 509 F. 2d 652 (1st Cir. 1974), the court noted that the analysis in *Healy* focused upon "the practicalities of human interaction."

> The ultimate issue at which inquiry must be directed is the effect which a regulation has on organizational and associational activity, not the isolated and for the most part irrelevant issue of recognition *per se*.

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5. Students at the defendant University are being denied true education if they are led to believe that there is no religious dimension to American society and culture and if religiously motivated students are denied the opportunity to speak about that dimension. *See Illinois Ex Rel. McCollum v. Board of Education*, 333 U. S. 203, 236 (1948).

Id. at 659. The effect on associational activity by these religious students is clear from the record. They are being denied the right to associate and numerous students are simply *not* associating at any location whatsoever. This denial of the opportunity to communicate religious ideas is a direct and substantial infringement of the First Amendment.[6]

Neither is the constitutional balancing affected, as the trial court erroneously believed, by whether the practice involved is central to a particular religion or not, or whether the infringement causes the destruction or disintegration of a specific religion. The free exercise clause was designed to protect the conscience of individuals. It does not merely protect central tenets of particular religions. *Lewis v. Califano,* 616 F. 2d 73, 79-81, (3d Cir. 1980). Instead, the sincere religious belief of any individual is protected by the First Amendment. *Id.* at 81. Furthermore, an examination of the leading religious liberty cases illustrates that the free exercise clause applies to all types of religious beliefs. In *Gillette v. United States,* 401 U. S. 437, 439 (1971), this Court entertained a free exercise claim derived from a "personal decision" "based on a humanist approach to religion" which opposed participation in particular wars. Thus, personal, non-institutional belief, not central tenets of

6. Reliance on the belief-action dichotomy is also misplaced. Any distinction has been greatly diminished in recent years. This Court in *Sherbert v. Verner, supra,* at 403, in considering the belief-action distinction, noted that the "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." Any allegation that the peaceful activities of plaintiffs are a substantial threat to public safety, peace or order fails both factually and legally. In *Wisconsin v. Yoder, supra,* at 219-20, the Court was even more emphatic. "[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause . . . [B]elief and action cannot be neatly confined in logic-tight compartments." *Accord* L. Tribe, *American Constitutional Law,* at 837-39, 853-54 (1978); Note, "An Expansion Of The Free Exercise Clause: Wisconsin v. Yoder", 37 *Albany L. Rev.* 329, 331 (1973).

a religion, was recognized as legitimate. In the companion case of *Negre v. Larsen,* 401 U. S. 437, 440-41 (1971), this Court did not attempt to determine whether Negre's particular Roman Catholic belief ranked high or low among the tenets of Catholicism; whether any other Catholics in fact shared this view or if the Catholic faith would be destroyed. The Court permitted the free exercise claim and went on to other steps in the constitutional analysis. In *Sherbert v. Verner, supra,* at 399 and n. 1, the Biblically based belief that work should not be done on the Sabbath was protected. But work on the Sabbath would not have resulted in the destruction or disintegration of the religion at issue. The Appeals Court was correct then in its identification of the substantial infringement of religious liberty which has been proven.

C. No Compelling State Interest Can Be Found Outweighing the Direct and Substantial Infringement of Religious Liberty Which Was Proven Below.

As *Sherbert v. Verner, supra,* at 406, and *Wisconsin v. Yoder, supra,* at 215, clearly state, in this highly sensitive constitutional area no showing of a mere rational relationship to some "colorable state interest" suffices. Only "the gravest abuses, endangering paramount interests" can permit limitation of free exercise.

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Wisconsin v. Yoder, supra, at 215. A court should not accept "sweeping" claims but instead should "searchingly examine the interests that the state seeks to promote." *Id.* at 221. In Yoder the state's interest in its system of compulsory education and its interest in acting as parens patriae were insufficient. In *Sherbert v. Verner,* the integrity of a state unemployment compensation plan was not enough. In *Ohio v. Whisner,* 351 N. E. 2d 750 (Ohio 1976), the state's interest in insuring certain mini-

mum curriculum and faculty standards in private schools was inadequate. *See NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490 (1979). On the other extreme, the conscientious objector cases demonstrate that the nation's unassailable interest in self defense and the efficient conduct of war are substantial enough to outweigh the religious liberty interest found in those cases. *Gillette v. United States, supra; Johnson v. Robison,* 415 U. S. 361 (1974).

The basic finding of the district court was that the compelling state interest found in the establishment clause outweighed any religious or other liberty involved herein. The Court of Appeals, however, correctly reweighed the scales because of errors in identifying, among other things, the nature of the religious liberty interest and the degree of its infringement. Once that reidentification is made, amicus suggests that either no establishment clause values are endangered or any potential danger is outweighed by the nature of the free exercise values placed in the constitutional balance.

Any argument that the religious student in public education has few if any rights on state property ultimately relies upon the school prayer and bible reading cases of *Engle v. Vitale,* 370 U. S. 421 (1962), and *School District of Abington Township v. Schempp,* 374 U. S. 203 (1963). But, unless the religious segment of our student population is to be disenfranchised from the full protection of the First Amendment, this argument is faulty.[7] The "wall of separation between Church and State" should not be built around voluntary student initiated religious activity by adults on a state university campus. Indeed, this Court has recognized that its "metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis." *Gillette v. United States,*

7. *See generally* Toms and Whitehead, "The Religious Student In Public Education: Resolving A Constitutional Dilemma," 27 *Emory L. J.* 3 (1978).

401 U. S. 437, 450 (1971).[8] The "wall" metaphor should not be allowed to confuse the facts and issues herein.

It would strain the Constitution to argue that the framers of the establishment clause intended to prohibit voluntary student initiated religious activity between consenting adults on a state university campus. The purposes of the establishment clause are far different from the position taken by the defendants. In Chief Justice Burger's words:

> [F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.

Walz v. Tax Commission, 397 U. S. 664, 668 (1970). This case has no such elements of government support for religion. This Court should not lose sight of the "common sense" of the matter. *Zorach v. Clauson, supra,* at 312. This action involves voluntary activity between consenting adults in their social community, not sponsorship,[9] financial support and active involvement in religion.

(1) Governmental Neutrality

Abington Township v. Schempp, supra, at 225, stated that the government may not affirmatively oppose or show hostility to religion, thus preferring those who believe in no religion over those who do believe in religion. Considering the purposes behind the Religion Clauses, this Court has insisted upon neutrality with respect to the government's stance toward religion. In *Walz v. Tax Commission, supra,* at 676, this Court noted:

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8. *Accord Zorach v. Clauson,* 343 U. S. 306, 312 (1952).

9. As the Appeals Court correctly observed, mere tolerance of voluntary student initiated religious activity is not sponsorship in a constitutional sense. The University merely has to publicly disavow sponsorship and make it clear it is just permitting the exercise of constitutional rights. *See Allen v. Morton,* 495 F. 2d 65, 67, 90-91 (D. C. Cir. 1973).

> Few concepts are more deeply imbedded in the fabric of our national life, beginning with pre-revolutionary colonial times, than for the government to exercise at the very least this kind of *benevolent neutrality* toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.

See id. at 669. (emphasis added) As long ago as *Zorach v. Clauson, supra,* at 314, Justice Douglas stated that government cannot be indifferent to the religious element of our society.

> That would be preferring those who believe in no religion over those who do believe. . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

See Wisconsin v. Yoder, supra, at 234 n. 22. The modern "purpose", "effect" and "entanglement" formulation of the neutrality test is found in *Lemon v. Kurtzman,* 403 U. S. 602, 612 (1971) and *Walz, supra,* at 674. But the danger in applying tests in this sensitive constitutional area lies in the fact that even in *Lemon* itself, this Court acknowledged the difficulties it faces in drawing clear lines of demarcation. *Accord, Walz, supra,* at 668; *Committee For Public Education v. Regan,* — U. S. —, 100 S. Ct. 840, 851 (1980). This Court's cases under both Religion Clauses are simply *not fungible,* but depend upon their own particular facts and circumstances. The real test regulating student activity in the schools is that found in *Tinker v. Des Moines Independent School District, supra:* material and substantial disruption of the educational function. However, even applying the *Lemon* test, plaintiffs' religiously motivated actions do not violate the establishment clause.

The acceptance of an argument severely curtailing all religiously associated activity on campus oversteps the bounds of neutrality and enters the realm of hostility. Governmental neutrality means only that the university cannot encourage or discourage activity but it can tolerate it. Such a position has a "secular purpose" because it permits the communication of ideas, which is the preeminent secular purpose of education. Student organizations also are recognized and allowed to operate in order to foster educational goals such as leadership and communication skills. These are both legally acceptable purposes. It must be kept in mind that it is the "purpose" of the university, not that of the student, which is the focus. The primary "effect" of such a policy also has a primarily secular effect. It advances education by allowing students to meet and exchange ideas and share mutual interests. *Keegan v. University of Delaware, supra,* at 16. That these ideas, from the student's viewpoint, are religious is of no consequence. *Id.* Nor should entanglement ordinarily be involved if the school is not sponsoring or intimately regulating the activity. *See* Toms and Whitehead, *supra,* at 24-26.

All these students ask is that they have the same right of access to University facilities as any other student, on a first-come first-served basis. They seek no preference, just neutrality towards them. When a public facility is open on a non-discriminatory basis to both believers and nonbelievers "there is no 'establishment of a religion,' and there cannot be a meaningful perception of one." *O'Hair v. Andrus,* 613 F. 2d 931, 934 (D. C. Cir. 1979); *see Keegan v. University of Delaware, supra,* at 16.

(2) This Court's Education Cases

The fact is that precisely four opinions—no more, no less—have been handed down by this Court in cases having to do with either public school sponsorship or accommodation of religious activities. None of them dealt with truly voluntary "student initiated" activity between con-

senting adults at the university level. None of their facts even remotely resemble this case. In three decisions the Court ruled that public schools themselves cannot actively and affirmatively "sponsor" religious activities. The fourth held that no sponsorship is found in public school accommodation of the religious interests of students.

In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), *Engle v. Vitale*, 370 U. S. 421 (1962), and *Abington Township v. Schempp, supra*, the religious activities were (a) originated by the government and (b) curricular in nature. In each it appeared to very young school children that the state stood behind the ideological content of the doctrinal teaching or exercise. In each the government was *sponsoring* religion; and that is state action "respecting an establishment of religion" which is forbidden by the First Amendment.[10]

But under many circumstances the state may "accommodate" an activity which it can not sponsor. This Court's fourth decision illustrates this principle. In *Zorach v. Clauson, supra*, the arrangement was like that in *McCollum* except the weekly religious instruction was not held in the classrooms and the instructors were not under the control of the school. This was held not to be an establishment of religion. The circumstance that *Zorach* approved off-campus activities similar to those which *McCollum* forbade on campus has given rise to the simplistic notion that the only operative facts under the establishment clause are the time and place of the activity. However, Mr. Justice Brennan's concurring opinion in *Schempp,*

10. Non-curricular religious activity, in the form of religious invocations and benedictions at high school graduation ceremonies, has been approved by the courts. *Grossberg v. Deusebio*, 380 F. Supp. 285 (E. D. Va. 1974); *Wood v. Mt. Lebanon School District*, 342 F. Supp. 1293 (W. D. Pa. 1973); *Weist v. Mt. Lebanon School District*, 320 A. 2d 362 (Pa. 1974). Religious prayer among consenting adults to start public meetings also has been sustained. *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979); *Lincoln v. Page*, 241 A. 2d 799 (N. H. 1968).

supra, rejected this concept, pointing out, *id.* at 262, that the "deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects while the *Zorach* program did not."

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and the capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teachers for the enhancement of secular instruction.

Id. at 263. In a concurring opinion in *McCollum*, *supra*, at 230, four Justices foreshadowed this analysis and stated that the vice of the program was that "the momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning." These decisions, then, do not support any proposition which would deny consenting adult students the right, outside of classes, to meet voluntarily for religious purposes anywhere in the university community.

(3) This Court's Public Property Cases

There are other cases which deal with religious activities on public property. They did not find that state accommodation of religious activity on public property constituted a violation of the establishment clause. *See, e.g., Poulos v. New Hampshire*, 345 U. S. 395 (1953), *Tucker v. Texas*, 326 U. S. 517 (1946); *Kunz v. New York*, 340 U. S. 290 (1951); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Fowler v. Rhode Island*, 345 U. S. 67 (1953). An establishment clause issue had been raised in these cases. It was raised in *Kunz v. New York* in the dissenting opinion of Mr. Justice Jackson who felt that the decision in *McCol-*

lum v. Board of Education, supra, had held that "the Constitution will not suffer tax supported property to be used to propagate religion." 340 U. S. at 311 n. 10. In *Saia v. New York,* 334 U. S. 558, 569 (1948), the same argument was rejected.

Nor can it be argued that these cases were decided before the establishment clause doctrine was framed by this Court. *McCollum* was decided before any of them and *Zorach v. Clauson, supra,* was decided before *Poulous* and *Fowler.* Furthermore, as recently as 1972, this Court cited, discussed and primarily relied upon *Niemotko* and *Fowler* in a case involving both First Amendment freedooms on public property as well as the equal protection clause, twice pointing out that those cases involved religious activities on public property. *Police Department of Chicago v. Mosley,* 408 U. S. 92, 96-97 (1972).[11]

(4) The Doctrine of Accommodating Neutrality Resolves Any Balancing of Interests in Favor of the Plaintiffs.

Assuming that establishment clause considerations are involved in this case, the Court must weigh and balance all the other constitutional rights which are at issue including the free exercise of religion, freedom of association and speech. Since the students have proven that their actions are motivated by religious conviction and that their religious liberty has been constitutionally burdened, see *Sherbert v. Verner, supra,* the command of their religious convictions must be weighed on the scales of the

11. Entanglement could be raised in this context by a contention that permitting religious activity on public premises necessarily fosters an excessive entanglement by the state with religion because the state will end up having to allocate time and space. But the specter of allocation of time to "256 recognized denominations," as pertaining to the limited park facilities of Lockport, New York, was raised by Mr. Justice Jackson in his dissenting opinion in *Saia v. New York, supra,* at 570, and was apparently rejected by this Court.

accommodating neutrality principle which has developed under the Religion Clauses. Accommodating neutrality is the doctrine whereby this Court has protected free exercise claims from establishment clause challenges. Whenever the two clauses conflict free exercise claims must supercede establishment clause considerations. See *Sherbert v. Verner, supra,* at 409-10; *Wisconsin v. Yoder, supra,* at 234 n. 22. In any such conflict free exercise values must be preserved. Kurland, "The Supreme Court, Compulsory Education, And The First Amendment's Religion Clauses," 75 *W. Va. L. Rev.* 213, 244 (1973). Professor Tribe of Harvard has found that this conclusion accords with the intent of the framers of the Constitution. Tribe, *American Constitutional Law,* at 819 (1978).[12] When the two religion clauses overlap, a zone of intersection is created. This Court's recognition that free exercise values must be paramount in such cases has been characterized by Professor Tribe as the identification of "the zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests." Tribe, *supra,* at 823. In his words, this is the "zone of permissible accommodation" of establishment clause concerns to free exercise values.

The principle of accommodating neutrality was well stated by Justice Douglas in *Zorach v. Clauson, supra,* at 313-14 (emphasis supplied).

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs.

In *Walz v. Tax Commission, supra,* at 669, this Court noted—

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12. *Accord, Valent v. N. J. State Bd. of Ed.,* 274 A. 2d 832, 837 (N. J. Super. 1971)

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

(Emphasis supplied). Benevolent neutrality or amiableness, not hostility, should be the attitude towards the free exercise claim of these students. Perhaps the accommodation shield is best illustrated in *Wisconsin v. Yoder, supra.* In upholding the religious beliefs involved there this Court ruled that the recognition of an exemption for the Amish from the state's compulsory education system did not constitute an impermissible establishment of religion, but instead accommodated their religious beliefes and reflected the government's obligation of neutrality. *Id.* at 234 n. 22; *see* 220-21. The various concurring opinions in *Schempp, supra,* also discuss accommodation of religious values.

The Supreme Court of Delaware directly relied upon the accommodation principle in rejecting an establishment clause challenge to the student free exercise rights infringed in *Keegan v. University of Delaware, supra,* at 16. The significance of the accommodation principle also was reiterated in *O'Hair v. Andrus, supra.*

A panoply of other rights including free speech, association, etc., in addition must be carefully weighed in the balance by this Court. This is not the extraordinary case, bordering on state sponsorship of religious activities, or outright church interference on the university campus, which could outweigh the exercise by students of legitimate constitutional rights. This is a pure student rights case among consenting adults. As such the state, as a matter of constitutional law, cannot prove a compelling state interest.

CONCLUSION

These students are entitled to the same rights which Thomas Jefferson, the author of the famous "wall of separation of Church and State" phrase, successfully proposed to the Board of Visitors of the University of Virginia when he was its director: that sectarian "instruction" and "worship" for students be accommodated on the University campus. 19 *The Writings Of Thomas Jefferson,* Andrew A. Lipscomb ed. [Washington, D. C.: The Thomas Jefferson Memorial Association, 1903-04], pp. 408, 411, 413-16. The Court of Appeals put to rest the simplistic and legally erroneous idea that governmental ownership and control of property generally, and educationally employed property in particular, is the sole criterion by which private voluntary religious activity is measured on the scales of the Religion Clauses of the First Amendment. That Court ruled that the religiously motivated student is not made a second class citizen merely by his enrollment in a State university. That judgment should not be disturbed. Accordingly, certiorari should be denied.

Respectfully submitted,

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Dated: November 25, 1980

CERTIFICATE OF SERVICE

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

BE IT REMEMBERED, on this day of November, A. D., 1980, before me, the Subscriber, a Notary Public for the State and County aforesaid, personally appeared, Thomas Stephen Neuberger, who being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the within Motion for Leave to File Brief Amicus Curiae and Brief of the Center for Law and Religious Freedom of The Christian Legal Society as Amicus Curiae in Opposition to Granting of Certiorari to the following attorneys:

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SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Notary Public

Office-Supreme Court, U.S.
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No. 80-689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, *et al.*,
Petitioners,

v.

CLARK VINCENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Is it a violation of the establishment clause of the First Amendment to the United States Constitution to allow a recognized student group to hold regular reoccurring religious worship services or to have religious teaching sessions in buildings of or on the grounds of a tax-supported public institution of higher education?

2. Does the free exercise clause of the First Amendment to the United States Constitution or the freedom of speech clause of the First Amendment to the United States Constitution take precedence over the establishment clause of the First Amendment to the United States Constitution?

3. Does the mandate of the state constitution of the State of Missouri requiring strict separation of church and state when it comes to the use of the facilities of a tax-supported public institution of higher education for regular worship services or religious teaching by a recognized student group, provide a sufficiently compelling interest to justify an interference with or infringement upon the free exercise rights under the First Amendment to the United States Constitution of the students?

4. Is the campus, including buildings, sidewalks and grounds, of a tax-supported public institution of higher education, a "public place" or "open forum" similar to public parklands, and, if so, does that fact require the tax-supported public institution of higher education to make its facilities available for the regular religious worship services of or religious teaching by a recognized student group?

PARTIES TO THE PROCEEDING IN THE EIGHTH CIRCUIT

Clark Vincent and Jonathan Williams were the plaintiff-appellants to the United States Court of Appeals for the Eighth Circuit.

Gary Widmar, The Board of Curators of the University of Missouri, Barbara Berkmeyer, Daniel L. Brenner, Robert A. Dempster, William T. Doak, C. R. Johnston, Marian Oldham, Wallace R. Stacey, Rex Z. Williams and Van O. Williams were the defendant-appellees in the United States Court of Appeals for the Eighth Circuit. (Mrs. Berkmeyer and Mr. Van O. Williams have been replaced as members of the Board of Curators by Mr. David Lewis and Mr. William Cocos).

Bible Study, a student organization at the University of Missouri-St. Louis; the Christian Legal Society of the University of Missouri at Kansas City; Cornerstone, a student organization at the University of Missouri-Kansas City; the International Society for Krishna Consciousness; and the Holy Spirit Association for the Unification of World Christianity filed Brief Amici Curiae with the Eighth Circuit Court of Appeals.

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No. 80-689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, *et al.*,
Petitioners,

v.

CLARK VINCENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 635 F.2d 1310 (8th Cir. 1980) and is set forth in the Appendix to Petitioners' Petition for a Writ of Certiorari at A-1. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing or hearing by the Court en banc, including the dissent of Judges Bright and McMillian, entered on the 19th day of September, 1980, is set out in the Appendix to Petitioners' Petition for a Writ of Certiorari at A-21. The order staying the mandate of the United States Court of Appeals for the Eighth Circuit, entered on the 30th day of September, 1980, is set out in the Appendix to Petitioners' Petition for Writ of Certiorari at A-25. The findings of the United States District Court for the

Western District of Missouri is reported at 480 F. Supp. 907 (W.D. Mo. 1979) and is set out in the Appendix to Petitioners' Petition for Writ of Certiorari at A-26.

JURISDICTION

Respondents initiated the case at bar alleging jurisdiction under 42 U.S.C. 1983, 28 U.S.C. 2201 and 28 U.S.C. 1343(3). The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 4, 1980. The petition for rehearing or hearing en banc was filed on August 13, 1980 and denied on September 19, 1980. The order staying the mandate was issued by the United States Court of Appeals for the Eighth Circuit on September 30, 1980. Petitioners filed a Petition for Writ of Certiorari with the Supreme Court on October 27, 1980 and the Supreme Court granted the requested Writ of Certiorari on February 23, 1981. The jurisdiction of this honorable court rests on 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States Constitution. The First Amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case also involves the following provisions of the Constitution of the State of Missouri:

> That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or sup-

port any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same. Article I, Section 6, Constitution of the State of Missouri, 1945.

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship. Article I, Section 7, Constitution of the State of Missouri, 1945.

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever. Article IX, Section 8, Constitution of the State of Missouri, 1945.

The following regulations from the Collected Rules and Regulations of the University of Missouri are also involved in this case:

No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. Student congregations of local churches or of

recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106. Section 4.0314.0107 of the Collected Rules and Regulations of the University of Missouri.

Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group. Section 4.0314.0108 of the Collected Rules and Regulations of the University of Missouri.

STATEMENT OF THE CASE

This case was initiated on October 13, 1977, when twelve students of the University of Missouri-Kansas City filed a complaint in the United States District Court for the Western District of Missouri, Western Division. (J. A. 4).The students subsequently sought permission to file an amended complaint and did so on July 18, 1978. The students sought injunctive relief and a declaratory judgment that certain regulations of the University of Missouri, which dealt with use of University

buildings or grounds for religious worship or religious teaching, were unconstitutional and therefore void. The students sought enforcement of an alleged right to use University facilities as a place in which to hold meetings for the religious purposes of the student group to which they belonged (J.A.48, para. 4) and claimed that the University's refusal to allow such usage denied certain rights guaranteed them by the Constitution and laws of the United States. (J.A. 49-52).

Clark Vincent and Jonathan Williams (hereinafter referred to as "Respondents") were among the twelve students who initiated the action on October 13, 1977 (J.A. 4) and they were involved in cornerstone and participated in Cornerstone activities. (J.A. 26, Stipulation[1] No. 2). Cornerstone was and is an officially recognized student organization on the campus of the University of Missouri-Kansas City, which is a part of the University of Missouri system. (J.A 26, Stip. No. 1).

The University of Missouri is a constitutionally governed public corporation of the State of Missouri and operates other university campuses in Columbia, Missouri; Rolla, Missouri; and St. Louis, Missouri. The University is governed by the Board of Curators, an official nine-person body established by the Constitution of the State of Missouri for the government of the University and its affairs. (J.A. 26, Stip. No. 1).

The avowed purpose of Cornerstone is to promote a knowledge and awareness of Jesus Christ on the campus, and to encourage one another in the faith and to grow in the grace and knowledge of the Lord Jesus Christ. (J.A. 17, para. 5, Chess Affidavit). The members of Cornerstone are concerned with the practical aspects of how Christianity and the Bible relate to every aspect of their lives. (J.A. 17, para. 4, Chess Affidavit).

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[1] The facts of the case were stipulated to by the parties in documents filed with the trial court entitled "Stipulation of Fact" (J.A. 26) and "Supplemental Stipulation of Fact" (J.A. 37).

Each student at the University of Missouri-Kansas City pays a "Center Activities-Athletic Fee," the proceeds of which go, in part, to fund the operation of the student center (J.A. 26, Stip. No. 4) and for physical facility development (J.A. 37-38, Stip. No. 2 and 5).

One of the benefits afforded recognized student organizations at the University of Missouri-Kansas City is the privilege of using the student center (referred to at many schools as a student union) and certain other designated facilities of the University as a place in which to meet. (J.A. 26, Stip. No. 3). Although various religious groups, including Cornerstone, have been permitted to meet in the facilities of the University in the past, neither the Chancellor nor the Dean of Students of the University of Missouri-Kansas City have ever authorized a student organization to utilize a University facility for a meeting where they had full knowledge that the purposes of the meeting included religious worship or religious teaching. (J.A. 27, Stip. No. 9).

In early January, 1977, pursuant to established University procedures, Cornerstone sought permission to use Rooms 103 and 113 of Haag Hall Annex for two and one-half hours, from 7:00-9:30 p.m., on every Saturday night, from January 15, 1977 through May of 1977. (J.A. 27, Stip. No. 6). University oficials sought clarification as to the activities to be conducted at the proposed meetings and were advised that a typical Cornerstone meeting in University facilities usually included the following:

1. The offering of prayer;

2. The singing of hymns in praise and thanksgiving;

3. The public reading of scripture;

4. The sharing of personal views and experiences (in relation to God) by various persons;

5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and

6. An invitation to the interested to meet for a personal discussion.

The University was also advised by Cornerstone's attorney that worship was an important part of the general atmosphere of the meetings and that there was no doubt that the "undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting Jesus Christ both for salvation and for the power to live an abundant Christian life on earth." (J.A. 27, 33-35, Stip. No. 7, Exhibit C). These facts were later confirmed by the statements of one of the students who indicated that the intended program for the proposed Saturday night meetings consisted of Bible study and teaching, prayer, informal sharing, and singing and that the purpose of the group was "to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ and the Bible." (J.A. 18, Stip. No. 11, para. 8, Chess Affidavit).

Cornerstone's application for use of rooms in Haag Hall Annex[2] was rejected on or about February 4, 1977, because it was concluded that the conduct of the proposed meetings would be in violation of Sections 4.0314.0107 and 4.0314.0108 of the Collected Rules and Regulations of the University of Missouri (J.A. 27, Stip. No. 7) which have been in effect since sometime in 1972. (J.A. 26, Stip. No. 5).

The matter was submitted to Judge William R. Collinson on crossmotions for summary judgment (J.A. 36) and on December 11, 1979, Judge Collinson denied the Motion for Summary Judgment of the students and granted the Motion for Summary Judgment of Defendants Gary Widmar, the Universi-

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[2] While Cornerstone has not held group Bible studies on the University lawn (J.A. 27, Stip. No. 8), there was no evidence that Cornerstone had ever sought to do so in accordance with established University procedures (J.A. 20-22, Williams Affidavit).

ty of Missouri, and the individual members of University's governing board (hereinafter collectively referred to as "Petitioners"), thereby upholding Section 4.0314.0107 and Section 4.0314.0108 of the regulations of the University of Missouri. The trial court found that the sole university practice challenged was the University's refusal to permit the students to conduct regular religious services in university-owned buildings and that this ban on religious services was required by the Establishment Clause of the United States Constitution. Judge Collinson also found that there was no interference with the students' rights of freedom of religion; that there was no interference with their freedom of speech; that there was no denial of the students' right to equal protection of the laws; and that the University's challenged regulations were not vague and overbroad. (Opinion at pages A-26 to A-50 of Petitioners' Petition for Writ of Certiorari).

Respondents subsequently filed their timely appeal of the District Court judgment with the Eighth Circuit Court of Appeals. By opinion dated August 4, 1980, the Eighth Circuit Court of Appeals reversed the judgment of the trial Court and held that University regulation Section 4.0314.0107 was not required by the establishment clause of the First Amendment and was therefore invalid because of the burden it placed upon the rights guaranteed to the students by the First and Fourteenth Amendments of the federal Constitution. (Opinion at pages A-1 and A-20 of Petitioners' Petition for Writ of Certiorari).

Petitioners' request for a rehearing or hearing en banc was denied by the United States Court of Appeals for the Eighth Circuit on September 19, 1980, with a written dissent being made a part of that order. (Order and Opinion at pages A-21 and A-24 of Petitioners' Petition for Writ of Certiorari).

This honorable Court granted the Writ of Certiorari as requested by Petitioners on February 23, 1981.

Cornerstone remains an active officially recognized student organization of the University of Missouri-Kansas City (J.A. 16-17, para. 3, Chess Affidavit) and the members thereof continue to practice their beliefs (J.A. 17, para. 4, Chess Affidavit). Cornerstone was not permitted to hold meetings of the type described in their January, 1977, application on the campus (J.A. 26, Stip. No. 8) until September 3, 1980, when the University's governing board temporarily suspended Section 4.0314.0107 until final resolution of this litigation, said action being taken under threats by Cornerstone and others of additional legal actions. Until September 3, 1980, members of Cornerstone continued to meet off of the campus. (J.A. 18-20, para. 11, Chess Affidavit).

SUMMARY OF ARGUMENT

Section I

In this initial part of their argument, Petitioners address the question of whether or not the Establishment Clause of the First Amendment prohibits the use of University facilities for regular religious worship services or regular religious teaching sessions by an organized group of university students.

Using various methods of analysis previously suggested by this Court, Petitioners argue that such usage, if permitted, would go far beyond "accommodation" and would, instead, serve to advance the religious efforts of the students by providing them with financial assistance from public tax dollars and by providing them with the benefit of symbolic approval of their efforts by the State of Missouri.

Petitioners contend that while a regulation permitting such activity on the university campus would indeed be unconstitutional under the Establishment clause, a regulation prohibiting all such religious activity would not be under past guidelines provided by the Supreme Court.

Section II

Petitioners address the relationships of the various provisions of the First Amendment in Section II of their argument. Initially questioned is the usage of the term "religious speech" by the Eighth Circuit. Petitioners attempt to point out why such phraseology is not an appropriate method of justifying an infringement of the Establishment Clause of the magnitude sought in the case at bar.

In Section IIA, Petitioners discuss the purposes of the two-part religion clause of the First Amendment and argue that these two provisions were intended to work *together* to assure religious freedom and liberty and that to give the free exercise provision precedence over the establishment provision would defeat this historic intent.

In Section IIB, Petitioners argue that while there is perhaps room for the argument that freedom of speech and freedom of assembly are preferred freedoms, they were intended to protect completely different interests than the two-part religion clause. Thus, Petitioners submit that the freedom of speech and freedom of assembly provisions should not be considered to take precedence over the religion clause and thus be used as an easy, convenient means of interfering with the intent of the two-part religion clause.

Section III

In Section III of their argument, Petitioners first submit to the Court that there has been no infringement whatsoever of the free exercise rights of the student Respondents. Then, assuming arguendo that some minimal infringement could be found, Petitioners proceed to argue that the State of Missouri's chosen interest in maintaining a strict separation of church and state provides a compelling state interest sufficient to justify any such infringement.

Petitioners go into an extensive review of the history of Missouri's constitutional provisions which relate to separation of church and state in Section IIIB. They also set forth therein numerous decisions of the Missouri Supreme Court which verify Missouri's interest and which indicate that Missouri's requirement of separation is even more strict than that contained in the First Amendment.

Section IV

In the final part of their argument, Petitioners initially address whether or not the campus of a publicly funded university is a "public forum" similar to city streets and sidewalks and public parks. In Section IVA, Petitioners argue that the campus of a state university is dedicated to *secular* education. It should therefor be contrasted with other areas that have been considered to be "public forums" and Petitioners argue that this dedication to secular education should limit and restrict access to the campus, especially with regard to religious purposes.

Section IVB pursues this point and argues that even should the buildings and the lawn or open areas of the campus be considered to be "public forums," their usage for actual religious worship services and/or religious teaching sessions as sought by the Respondents in this case would not be permissible under the establishment clause.

ARGUMENT

I. IT WOULD BE A VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TO ALLOW A RECOGNIZED STUDENT GROUP TO HOLD REGULAR REOCCURRING RELIGIOUS WORSHIP SERVICES OR TO HAVE RELIGIOUS TEACHING SESSIONS IN BUILDINGS OF OR ON THE GROUNDS OF A TAX-SUPPORTED PUBLIC INSTITUTION OF HIGHER EDUCATION.

The United States Court of Appeals for the Eighth Circuit determined that Petitioners denied a recognized student group of the University of Missouri-Kansas City access to University facilities based on Petitioners' ". . .conclusion that the group's meetings include either religious worship or religious teaching." *Chess* v. *Widmar,* 635 F.2d 1310, 1320 (8th Cr. 1980). This is a mistatement. Your Petitioners would submit that, in fact, there can be *no* question that the meetings of Cornerstone included and/or were held for purposes of religious worship, religious teaching and religious evangelism. As stated by Judge Collinson in his opinion below:

> "In this case, it is uncontradicted that plaintiffs seek to use state-owned buildings on a regular basis for the conduct of their religious worship services." *Chess* v. *Widmar,* 480 F. Supp. 907, 915 (W.D. Mo. 1979), rev'd 635 F. 2d 1310 (8th Cir. 1980).

This fact has been candidly admitted by the students. (J.A. 18, 33-35). See also *Chess, supra,* 480 F. Supp. at 920. Petitioners would submit that reading from and commentary on the Holy Bible,[3] the offering of prayer,[4] the sharing of personal views and

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[3] See *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 224, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844 (1963).

[4] See *Engel* v. *Vitale,* 370 U.S. 421, 424-425, 82 S. Ct. 1261, 1264, 8 L. Ed. 2d 601 (1962), *Hall* v. *Bradshaw,* 630 F. 2d 1018, 1020, 1021 (4th Cir. 1980), cert. den., Case No. 80-746 on 3-3-81 (49 L.W. 3637), and *Stein* v. *Oshinsky,* 348 F.2d 999 (2d Cir 1965), cert. den. 382 U.S. 957, 86 S. Ct. 435, 15 L. Ed. 2d 361 (1965).

experiences in relation to God, and the singing of hymns are extremely religious activities and indeed can be considered integral parts of religious worship. The denial in this case was actually based on Petitioners' conclusion that permitting such meetings by Cornerstone on the premises of a publicly funded and tax-supported institution of higher education would violate and contravene the mandates of the First Amendment to the United States Constitution and several provisions of the Constitution of the State of Missouri. Petitioners maintain that these constitutional prohibitions are *absolute*! In so holding with regard to the First Amendment, this Court has stated:

> "While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as a part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public. . .colleges which 'aid or oppose' any religion." *Epperson* v. *Arkansas,* 393 U.S. 97, 106, 89 S. Ct. 266, 271, 21 L. Ed. 2d 228 (1968).

Petitioners believe that the use of facilities sought by Respondents in this case would aid and advance religion, and would thus be in violation of the First Amendment of the United States Constitution. Petitioners submit that the usage sought by Respondents falls within this Court's holding in *Hunt* v. *McNair,* 413 U.S. 734, 93 S. Ct. 2868, 27 L. Ed. 2d 923 (1973) that aid:

> "...normally may be thought to have a primary effect of advancing religion...when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt, supra,* 413 U.S. at 743, 93 S. Ct. at 2874.

A logical starting place would seem to be Justice Black's oft-quoted explanation of what the "establishment of religion" clause of the First Amendment means. In *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 67 S. Ct. 504, 88 L. Ed. 1148 (1947), Justice Black said that this historically significant clause at least means that:

> "Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or dis-belief in any religion. No person can be punished for entertaining or professing beliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between Church and State.'" 330 U.S. at 15-16, 67 S. Ct. at 511-512. (Emphasis Added).

It can also be noted that the purpose of the Establishment Clause was to assure that a government would not "exert its power in the service of any purely religious end." *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 234, 83 S. Ct. 1560, 1577, 10 L. Ed. 2d 899 (1963) (Brennan, J., concurring).

A three-part test has emerged from this Court's cases involving the Establishment clause.[5] Under this now familiar test, the governmental law or regulation in question must (1) reflect a clearly secular legislative purpose; (2) have a primary effect that

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[5]In *Tilton* v. *Richardson,* 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971), Chief Justice Burger suggested an additional fourth test: does implementation of the Act inhibit the fee exercise of religion? While this suggested additional factor has not been picked up in subsequent decisions, see *Committee for Public Education and Religious Liberty* v. *Regan,* 444 U.S. 646, 653, 100 S. Ct. 840, 846, 63 L. Ed. 2d 94 (1980), Petitioners submit that Section III of their brief, *infra,* demonstrates that there has been no inhibition of free exercise of religion in this case.

neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion to pass muster under the Entanglement Clause. *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 773, 93 S. Ct. 2955, 2965, 37 L. Ed. 2d 948 (1973).[6] The District Court, in applying this test, considered a University policy that would permit *any* student group to meet in university-owned buildings for *any* purpose, regardless of religious affiliation. *Chess* v. *Widmar,* 480 F. Supp. 907, 914 (W.D. Mo. 1979). The Court, citing *Tilton* v. *Richardson* and *Schempp,* found that while this sort of regulation would have a clear secular purpose and would avoid entanglement with religion, a policy of permitting regular religious services in university-owned buildings would have the primary effect of advancing religion. *Chess, supra,* 480 F. Supp. at 941-916. Before proceeding with an analysis of whether such a use would have a "primary effect that advances religion", Petitioners would ask the Court to consider Petitioners' contention that to allow the Cornerstone group to use the University facilities in the manner sought would *also* lead to an impermissible "excessive government entanglement with religion" under the third factor of the three-pronged test. This Court has often expressed its concern about the potential for divisive political effect of a program of aid or assistance. *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 795-96, 93 S. Ct. 2955, 2977, 37 L. Ed. 2d 948 (1973) and *Meek* v. *Pettinger,* 421 U.S. 349, 374, 95 S. Ct. 1753, 1767, 44 L. Ed. 2d 217 (1975) (Brennan, J., concurring and dissenting). Petitioners submit that to allow the usage sought by the Respondent in this case would engulf Petitioners in such "political divisiveness." It is known from long experience that

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[6]Petitioners submit that the University regulations in question also comply with the analysis that has been suggested by Justice Brennan. *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664, 680, 90 S. Ct. 1409, 1417, 25 L. Ed. 2d 697 (1970) (Brennan, J., concurring).

> "...aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies." *Nyquist, supra,* 413 U.S. at 797, 93 S. Ct. at 2977.

Petitioners submit that if University facilities, built, maintained and operated by taxpayer monies, are permitted to be used for religious worship and religious teaching by recognized student groups, such action will undeniably lead to corrosive devisiveness and thereby activate a tarnishing of the brilliance of the Establishment Clause. Maintenance, construction and utility costs are ever-increasing and this in itself would require greater and greater expenditures of tax funds for religion. Secondly, these religious student groups would be put in competition with other student groups, both religious and non-religious, for continuing and greater usage of facilities. *Johnson* v. *Huntington Beach Union High School Dist.,* 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, 50-51 (1977), *cert. den.* 434 U.S. 877, 98 S. Ct. 228, 54 L. Ed. 2d 156 (1977).[7] Finally, it requires no prophet to perceive the eventual requests for support above and beyond the free usage of space. *Board of Ed. of Cent. Sch. Dist. No. 1* v. *Allen,* 392 U.S. 236, 253, 88 S. cT. 1923, 1931, 20 L. Ed. 2d 1060 (1968) (Black, J., dissenting). Even "... the most solid freedom steadily gives way before continuing corrosive action." *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 29, 67 S. Ct. 504, 518, 88 L. Ed. 1148 (1947) (Rutledge, J., dissenting).

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[7]Petitioners believe a case such as *Johnson* is helpful to the Court, even though it deals with a high school group. Petitioners believe that these cases are authoritative and will make additional references to certain other such cases. As one court has said with regard to freedom of the press, "...the relevent principles and rules apply generally to both high schools and universities." *Scoville* v. *Board of Ed. of Joliet Tp. H.S. Dist. 204, Etc., Ill.,* 425 F.2d 10, 13, fn. 5 (7th Cir, 1970), *cert. den.* 400 U.S. 826, 91 S. Ct. 51, 27 L. Ed. 2d 55 (1970).

A. Allowing The Cornerstone Group To Hold Regular, Reoccurring Religious Worship Services Or To Hold Regular Reoccurring Religious Teaching Sessions On The Campus Of The University Of Missouri Would Advance Religion.

Returning to the question of whether use of University facilities "advances religion," Petitioners submit that the determination made by Judge Collinson as to the improper advancement of religion is the correct one under the law.

The "primary effect" test forbids any governmental action that has a substantial religious impact and Petitioners believe such a *substantial religious impact* is present in this case. Petitioners maintain that Respondents are actually asking the University to lend its support to Cornerstone's efforts to "gain and keep adherents." This is an improper arrangement under the Establishment Clause. *School District of Abington Tp, Pa.* v. *Schempp*, 374 U.S. 203, 228, 83 S. Ct. 1560, 1574, 10 L. Ed. 2d 844 (1963) (Douglas, J., concurring). There can be no question but that religion and/or the religious purposes of the Cornerstone group and the student members thereof would be greatly benefited in this case.

1. To allow such meetings would provide the aura of implied approval by the University of Missouri and thereby the implied approval of the State of Missouri.

The first impermissible advancement is the implicit imposition of the state's imprimatur on the activities of the Respondents and their group. Petitioners argue that this is admitted by the affidavits submitted in support of Respondents' position. The affidavit of one of the students, Frederick Florian Chess, provides ample support for this contention of Petitioners. Mr. Chess swears in his affidavit (J.A. 18-19) that:

> "... it is difficult to interest other students in any activities which are off campus. *Students know that if something is on campus, then it is a student organization, and they are*

> *more likely to feel comfortable attending a meeting.* (Emphasis Added).

and,

> "... students who are not familiar with where we are meeting are not as likely to go to an unfamiliar address...as they would be to go to a regularly used and well-known campus building."

and,

> "Another disadvantage is that it makes our message and our purposes seem less remote and less relevant to the typical student. *Having to explain that we have to meet off campus tends to make students think that there is something 'wrong' with us and that there is something wrong with religion* since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group." (Emphasis Added).

This indicates to Petitioners that Respondents wish or desire the approval of the University to help them "effectively" spread their message to those "uncommitted" students they seek to bring into their group. Petitioners further contend that these quotations also indicate dramatically the import of the "symbolic" approval by the University of Respondents' efforts. See *Fox* v.*City of Los Angeles,* 150 Cal. Rptr. 867, 587 P.2d 663, 673 (In Bank 1978). Is this not a case where the Cornerstone group is seeking to use the facilities of the state university to gather those who are otherwise "...presumably too unenthusiastic to go unless moved to do so...." without this implied support? *Zorach* v. *Clauson,* 343 U.S. 306, 318, 72 S. CT. 679, 686, 96 L. Ed. 954 (1952) (Black, J., dissenting). Petitioners submit that the statements of Mr. Chess clearly indicate that the students seek to utilize "'...the prestige, power and influence'

of a public institution to bring religion into the lives of citizens." *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664, 696, 90 S. Ct. 1409, 1425, 25 L. Ed. 2d 697 (1970) (Harlan, J., concurring). Petitioners would submit that the "official support" implied by Cornerstone's usage of University facilities would be equal to or greater than the posting of the Ten Commandments found to be impermissible by this Court in *Stone* v. *Graham,* ____ *U.S.* ____, *101 S. Ct. 192, 194, 66 L. Ed. 2d 199 (1980). See also Ring* v. *Grand Forks Public School District No. 1,* 483 F. Supp. 272 (N.D. 1980) where a similar statute, applicable also to the president of every institution of higher education in the state, was held to be in violation of the establishment clause.

According to Cornerstone, meeting on the campus makes students feel comfortable attending a meeting; it makes it more likely that students will come to meetings; it will encourage students to return to meetings; it will make students feel that there is nothing wrong with religion; that religion has something to do with the realities of life; and it would allow greater attendance at Cornerstone meetings. Can it sincerely be said that these factors will not aid and abet the purpose of Cornerstone to "encourage one another in the faith and to grow in the grace and knowledge of the Lord Jesus Christ" (J.A. 17) and to attract the uninvolved so that they too might assure themselves that the "answers to life's unltimate questions rest with Jesus Christ and the Bible" (J.A. 18)? See *Johnson* v. *Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 16, 137 Cal. Rptr. 43, 51 (1977).

2. To allow such meetings would provide financial assistance to the religious purpose of Cornerstone.

Secondly, and equally important is the problem of the extension of financial aid (financial aid that comes from taxpayers) which would undeniably be extended to Respondents. See *McGowan* v. *State of Maryland,* 366 U.S. 420, 452-453, 81 S. Ct. 1101, 1119, 6 L. Ed. 2d 393 (1961) where the Court in-

timated that the use of "tax-supported buildings" was an aid to religion as much as the use of "tax monies," and see *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 774-75, 93 S. Ct. 2955, 2966, 37 L. Ed. 2d 948 (1973) where this Court recognized that expenditures for maintenance and repair, renovation, and for the cost of heating and lighting classrooms of sectarian schools had a primary effect of advancing religion. See also *Trietley* v. *Board of Education of City of Buffalo,* 65 A.D.2d 1, 409 N.Y.S.2d 912, 916 (1978). The Eighth Circuit determined that there *would* be financial support to Respondents. *Chess* v. *Widmar,* 635 F.2d 1310, 1317 (8th Cir. 1980). However, the Court attempted to avoid this crucial finding by characterizing the financial support as "minimal." It is quite clear under this Court's decisions that even "three pence" tax is too much. See Justice Douglas' dissent in *Tilton* v. *Richardson,* 403 U.S. 672, 693 91 S. Ct. 2091, 2102-2103 29 L. Ed. 2d 790 (1971). See also *Hall* v. *Bradshaw,* 630 F. 2d 1018 (4th Cir. 1980) where the Court said at page 1021:

> "... the limited nature of the encroachment does not free the State from the limitations of the Establishment Clause."

To allow or require *any* taxpayer support would certainly appear to run afoul of Madison's remonstrance that "... no person, either believer or non-believer, should be taxed to support a religious institution of any kind...." *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 12, 67 S. Ct. 504, 510, 88 L. Ed. 1148 (1947). Of course, Petitioners have spoken heretofore in terms of taxes paid by the citizens of the State of Missouri. However, cannot the student's activity fee (J.A. 26) also be viewed as a "tax"? Students pay this fee, a part of which goes to maintain the student union and other campus physical facilities. (J.A. 37, 40-41). To allow the usage sought by the students of Cornerstone must also be considered to infringe upon the rights of the campus "taxpayers."

> "...when taxpayers of many faiths [or no faith] are required to contribute money for the propagation of faith, the Free Exercise Clause is infringed." *Lemon* v. *Kurtzman,* 403 U.S. 602, 627-628, 91 S. Ct. 2105, 2118, 29 L. Ed. 2d 745 (1971). (Material added).

Petitioners would also submit that the University regulation in question stands up to the rigors of the three-pronged test under analysis from a different perspective. Let us examine the University regulation as it now stands (prohibiting religious worship) in light of the requirements of the test. First, a regulation that forbids usage of tax-supported state facilities for "religious worship" or "religious teachings" has a clear secular purpose. In fact, the regulation in question specifically provides that it "...is a policy required, in the opinion of the Board of Curators, by the Constitution and laws of the State...." (J.A. 29). Secondly, this policy does not advance or inhibit religion. The *beliefs* of Respondents are not in any way inhibited. Finally, this policy does not lead to an impermissible entanglement. Petitioners submit that they cannot assume "bad faith" upon the part of Respondents in regard to compliance with the regulations. *Lemon* v. *Kurtzman,* 403 U.S. 602, 618, 91 S. Ct. 2105, 2114, 29 L. Ed. 2d 745 (1971), *Committee for Public Ed., Etc.* v. *Regan,* 444 U.S. 646, 660-661, 100 S. Ct. 840, 850, 63 L. Ed. 2d 94 (1980). Respondents have, in fact, been quite candid and very specific as to the intent, motivation and purpose of their group. If this Court does find an impermissible establishment in permitting such usage of University facilities, Petitioner would expect no attempt at surreptitious worship by Respondents.

Healy v. *James,* 408 U.S. 169, 92 S. CT. 2338, 33 L. Ed. 2d 266 (1972) indicates that it would be perfectly permissible to require Respondents to agree to abide by University regulations prior to their usage of the facilities. All that would be required to monitor utilization would be continued use of the request form. Use of such a form, and its enforcement, would require

no greater entanglement than that previously permitted by this Court.In *Tilton,* the Court referred to "inspection" as being a "minimal contact" and explained that:

> "Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that states impose over all private schools within the reach of compulsory education laws." *Tilton* v. *Richardson,* 403 U.S. 672, 687, 91 S. Ct. 2091, 2100, 29 L. Ed. 2d 790 (1971). *Roemer* v. *Board of Public Works of Maryland,* 426 U.S. 736, 764, 96 S. Ct. 2337, 2353, 49 L. Ed. 2d 179 (1976).

B. A Considered Review Of Prior Decisions Of This Court And Other Jurisdictions Provide No Support To Justify The Aid And Assistance Sought By Respondents.

In *Tilton* v. *Richardson,* 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971), a case from the college or university setting where the question of assistance to religion was involved, and a case upon which Judge Collinson relied heavily, this Court aproved federal construction grants ". . . for buildings and facilities used exclusively for secular education purposes." However, the Court made it clear that:

> "The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans *only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship." Tilton* v. *Richardson, supra,* 403 U.S. at 679-680, 91 S. Ct. at 2096. (Emphasis Supplied).

and,

> "The institutions presented evidence that there had been no religious services or worship in the federally financed facilities. . ." *Tilton* v. *Richardson, supra,* 403 U.S. at 680, 91 S. Ct. at 2096.

Furthermore, the Court struck down a clause in the legislation which removed any restrictions on use after twenty years had expired. In writing the majority opinion, Chief Justice Burger held that such assistance in providing funds to build "buildings or facilities" for use of religion trespassed on the Religion Clause:

> "*If,* at the end of 20 years, *the building is,* for example, converted into a chapel or otherwise used *to promote religious interests,* the original federal grants will in part have the effect of advancing religion." *Tilton, supra,* 430 U.S. at 683, 93 S. Ct. at 2098. (Emphasis Added).

The Eighth Circuit attempted to distinguish *Tilton,* but could not effectively do so. In the recently decided case of *Dittman* v. *Western Washington University,* ____F. Supp.____ (W.D. Wa. 1980), app. dock. 9th Cir., the United States District Court for the Western District of Washington was faced with an almost identical situation as that before Judge Collinson. The Court in *Dittman* found:

> "The Court finds in the present case that the regular use of the University's classrooms and auditoriums for religious purposes would constitute an advancement of religion by the state. Moreover, the regular use of state facilities for religious purposes would have the unavoidable effect of placing the imprimatur of government upon the religious activities being conducted in those facilities.****
>
> "The Court concludes that it would be a violation of the Establishment Clause of the United Stated Constitution for the University to make its facilities available on a regular basis to religious groups for religious purposes." *Dittman, supra,* Slip Opinion, page 5.

In *Pratt* v. *Arizona Board of Regents,* 110 Ariz. 466, 520 P.2d 514 (Banc 1974), the Court dealt with requests for the usage of the football stadium on the campus of Arizona State University for religious services. While approving a rental to the Billy

Graham organization and holding that the leasing of Sun Devil Stadium for such "occasional religious services" at "fair rental value" was merely a straight commercial transaction, the Arizona Supreme Court, sitting en banc, made it very clear that anything not within these limited circumstances would not be upheld. The Court said at page 517:

> "The lease to a religious group, on a permanent basis, of property on the University campus, for example, would be an entirely different matter because by the permanency of the arrangement, the prestige of the State would be placed behind a particular religion or religion generally. Also, the lease of campus facilities for occasional use, but not for fair rental value, would violate the provision of our Constitution as being an appropriation or application of State property for religious purposes." See also *Resnick* v. *East Brunswick Tp. Bd. of Education,* 135 N.J. Super. 257, 343 A.2d 127, (1975), aff'd., 77 N.J. 88 389 A.2d 944 (1978).

Petitioners submit that Respondents actually have only one authority, from a University setting upon which to rely in support of their position. That case is, of course, *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975), cert. den. 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976). Unfortunately, the decision in *Keegan,* with all due respect to the Supreme Court of Delaware and Respondents, is a flawed one.[*] This was adequately pointed out by Judge Collinson in his opinion, *Chess* v. *Widmar, supra,* 480 F. Supp. at 916-917, Slip O., pp. 14-17. The *Keegan* case was also dismissed by Judge Vorhess in *Dittman* v. *Western Washington University,* Case No. C79-1189V, by saying that Keegan "seems to give insufficient weight to the Establishment Clause." *Dittman, supra,* Slip Opinion at page 5.

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[*] University submits that *Keegan* v. *University of Delaware* is not supported by Supreme Court precedent. In addition, there are other distinguishing factors about the case: (1) There is no reference to any organized student group being involved; (2) the case dealt with an area in the students' living quarters; (3) there is no indication that the services were intended to be open to the public; and (4) the Constitution of the State of Delaware was apparently not a factor of importance.

The Supreme Court of Delaware made no analyses of the individual prongs of the three-part test enunciated in *Lemon* v. *Kurtzman, supra.* The bald unsupported statement is made that abolishing the University policy as to religion would not run afoul of the prescribed tests. Additionally, and as pointed out by Judge Collinson, the authorities cited by the Delaware Court do not support the propositions for which they are cited. In fact, if *Zorach* v. *Clauson,* 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), means anything, when read in conjunction with *People of State of Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 648 (1948), it is that religious services cannot be held in tax-supported facilities. See *Zorach, supra,* 343 U.S. at 308-309, 72 S. Ct. at 681.

C. The Respondents Seek More Than Permissible Accommodation.

While not preventing or discouraging *reasonable* accommodation of religion, the First Amendment, as interpreted by the Supreme Court, requires a position of "neutrality." Petitioners submit they have shown neutral accommodation in recognizing Cornerstone and other such student groups (there are nine other recognized student groups on the campus that have religious or quasi-religious orientations) and in permitting equal access to University facilities as long as religious worship or teaching are not involved. However, it does not make the state unneutral to withhold what the Constitution forbids it to give. *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 59, 67 S. Ct. 504, 532, 88 L. Ed. 1148 (1947) (Rutledge, J., dissenting). Of course, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility. *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 246, 83 S. Ct. 1560, 1584, 10 L. Ed. 2d 844 (1963). In *Engel* v. *Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) this Court said:

> "It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong." *Engel, supra,* 370 U.S. at 433-434, 82 S. Ct. at 1268.

Petitioners submit that to permit the activities sought by Respondents in this case would be beyond reasonable accommodation and would trample any idea of neutrality! *Brandon* v. *Board of Ed. of Guilderland,* 487 F. Supp. 1219, 1226-1229 (N.D.N.Y. 1980) aff'd. 635 F.2d 971 (2d Cir. 1980).

"Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among these religion-education precedents, two general categories of cases may be identified; those dealing with religious activities within the public schools, and those involving public aid in varying forms to sectarian educational institutions." *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 772, 93 S. Ct. 2955, 2965, 37 L. Ed. 2d 948 (1973). While those in the latter category are sometimes approved, those in the former are almost never. *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 82 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); *Engel* v. *Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962).[9] It is clear that the assistance sought in this case must be classified in this disfavored category.

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[9] Petitioners would refer the Court mo pages 12-14 of their Brief filed with the Eighth Circuit where a comprehensive spectrum of cases prohibiting various religious activities *in* public schools is provided.

II. NEITHER THE FREE EXERCISE PROVISION OF THE RELIGION CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION NOR THE FREEDOM OF SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TAKE PRECEDENCE OVER THE ESTABLISHMENT PROVISION OF THE RELIGION CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners are greatly concerned about the Eighth Circuit's usage of the phraseology "religious speech" in this case. *Chess* v. *Widmar,* 635 F.2d 1310, 1315 (8th Cir. 1980). Is the Eighth Circuit purporting to use a "Super-Freedom" which melds and encompasses the protections granted to religion, intended to insure the freedom and independence of religion and religious groups, with the privileges extended to speech by our forefathers? Petitioners submit that the appellate Court was actually attempting to construct and use a "fiberglass pole" with which to ease and assist its efforts to spring over the Establishment wall. Petitioners question the use of a semantical artifice such as this to justify a constitutional infringement of this magnitude.

The First Amendment speaks in terms of "religion" and "speech". There is no mention whatsoever of a separate protection for "religious speech." Petitioners contend that something is either within the reference of the "religion clause" or within the reference of the "freedom of speech clause." Petitioners would not deny that you can have speech on religious topics or speech on or about religions, *Kunz* v. *People of State of New York,* 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 267 (1951), but would respectfully suggest that there is no support for any idea that such speech is any different than speech about politics; about tax reform; about abortion; about civil rights; or about capital punishment. It is still "speech" and such speech should not be given any greater protection because it happens to be

about a religious subject. Chief Justice Warren, writing for the Court in *U.S.* v. *O'Brien,* 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) said

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien, supra,* 391 U.S. at 376, 88 S. Ct. at 1678.

To so hold would in effect create a "Super-Freedom" which would in turn make the Establishment provision, so carefully expressed and nurtured by our founding fathers as an coguarantor in the protection of religious liberty, effectively meaningless. Petitioners would further suggest, that in the case at hand, the activities sought by the Respondents in this case go far beyond the realm of speech, symbolic or otherwise. The activities which take place at and encompass a Cornerstone meeting are integral parts of religion. They are part and parcel of religious worship. See *Collins* v. *Chandler Unified School District,* 470 F. Supp. 959, 963 (D. Ariz. 1979). This is so in the common understanding of any observer, and the understanding under the law, as set forth earlier in Petitioners' brief. This case is dictated by the *religion clause* of the First Amendment . . . not the freedom of speech clause.[10]

A. The Establishment Provision Was Not Intended To Be Of Secondary Importance To The Free Exercise Provision.

Petitioners think it important that the Court notice that they refer to the "religion clause." Not the "free exercise clause." Not the "establishment clause." This is based upon Petitioners'

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[10] Petitioners acknowledge that the Eighth Circuit also used a concept referred to as "the freedom to associate for the advancement of religious beliefs." While not specifically addressed, Petitioners ask the Court to consider its argument with regard to the freedom of speech clause to be equally applicable to the freedom of assembly clause.

argument that these two individual clauses make up a *combined* standard to protect the "freedom of religion." They are correlative and coextensive ideas, representing only different facets of a single great and fundamental freedom, *Everson* v. *Board of Education of Ewing Tp.*, 330 U.S. 1, 40, 67 S. Ct. 504, 523, 88 L. Ed. 1148 (1947) (Rutledge, J., dissenting), and they emerged from a common panorama of history. *Schempp, supra,* 374 U.S. at 232, 83 S. Ct. at 1577 (Brennan, J., concurring). They are mutual partners in the effort to keep church and state separate and thereby preserve the strength and integrity of both institutions.

> "These two proscriptions are to be read together, and *in light of the single end which they are designed to serve.* The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 305, 83 S. Ct. 1560, 1615, 10 L. Ed. 2d 84 (1963) (Goldberg, J., concurring). (Emphasis added).

While it can perhaps be argued that there is a "tension" between the two clauses, there is no support for the position that one or the other takes precedence.

> "'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are the other." *Everson* v. *Board of Education of Ewing Tp.*, 330 U.S. 1, 32, 67 S. Ct. 504, 519, 88 L. Ed. 1148 (1947) (Rutledge, J., dissenting).

The two provisions were intended to forbid two quite different kinds of governmental encroachment upon religious freedom. *Engel* v. *Vitale,* 370 U.S. 421, 430, 82 S. Ct. 1261, 1267, 8 L. Ed. 2d 601 (1962), *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 217-218, 83 S. Ct. 1560, 1569, 10 L. Ed. 2d 844 (1963). Nor is there any basis for the argument that the purpose of the establishment provision was only to insure protection for the "free exercise of religion." *McGowan* v. *State of Maryland,* 366 U.S. 420, 430, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). See also *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 15, 67 S. Ct. 504, 511, 88 L. Ed. 1148 (1947) (Black, J., dissenting).

In considering the Respondents' argument that the Supreme Court had relegated the establishment provision to a position inferior to that of the free exercise provision, the lower Court found such a position to be "without merit." *Chess* v. *Widmar,* 480 F. Supp. 907, 917 (W.D. Mo. 1979).

B. The Religion Clause And The Freedom Of Speech Clause Relate To Two Separate Evils And Thus One Cannot Be Said To Take Precedence Over The Other.

While Petitioners would concede that the draftsmen of our national Constitution perhaps indicated a preference for freedom of speech,[11] assembly, press and right to petition government, Petitioners would strongly argue that there is no support for the position that the freedom of speech clause was intended to be used as an escape device from the two "religion clauses", either together or individually. See *Williams* v. *Eaton,* 330 F. Supp. 107 (D. Wyo. 1971), aff'd. 468 F.2d 1079 (10th

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[11] It is nevertheless well understood that even the right of free speech is not absolute at all times and under all circumstances. *Chaplinsky* v. *State of New Hampshire,* 315 U.S. 568, 571, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942). See also *Tinker* v. *Des Moines Ind. School Dist.,* 393 U.S. 503, 522, 89 S. Ct. 733, 744, 21 L. Ed. 2d 731 (1969).

Cir. 1972) where the Court held that plaintiffs could not, under the guise of freedom of speech, hold a protest-demonstration against beliefs of the Mormon Church, on University property, because such activity would have been a violation of First Amendment's establishment provision (*and* the Wyoming constitution). As stated by Justice Stewart:

> ". . . acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired." *McDaniel* v. *Paty,* 435 U.S. 618, 98 S. Ct. 1322, 1377 at asterisk, 55 L. Ed. 2d 593 (1978) (Stewart, J., concurring).

The speech clause and the two provisions of the religion clause of the First Amendment are intended to control different areas. The religion clause is undeniably distinct. As Justice Jackson noted in his dissent in *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 67 S. Ct. 504, 88 L. Ed. 1148 (1947):

> ". . . the effect of the religious freedom Amendment to our Constitution was to take *every form* of *propagation of religion* out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayer's expense. *That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation,* a difference which goes to the very root of religious freedom. . . ." *Everson, supra,* 330 U.S. at 27, 67, S. Ct. at 516. (Emphasis added). See also *Lemon* v. *Kurtzman,* 403 U.S. 602, 633, 91 S. Ct. 2105, 2121, 29 L. Ed. 2d 745 (1971).

We must assume that the draftsmen of the Constitution intended what they wrote, An interpretation that "speech" or "assembly" took precedence would allow religious groups to go anywhere and say "we are here to speak" or "we are here to assemble" and thereby defeat the religion clauses, particularly the establishment provision, and all they stand for. As stated by

this Court in *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 795, 93 S. Ct. 2955, 2977, 37 L. Ed. 2d 948 (1973),

> ". . . the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State. . .have been regarded from the beginning as among the most cherished features of our constitutional system."

Of course, in so doing, religious groups, including Cornerstone, would be heading down the primrose path of denying themselves the independence of religious worship and liberty they have enjoyed in this country for over 200 years. Such an interpretation of the Constitution should not be lightly considered. It will suffice to say:

> "That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 1193, 87 L. Ed. 1628 (1943) (Frankfurter, J., dissenting).

III. ALTHOUGH THERE HAS BEEN NO INFRINGEMENT OF FREE EXERCISE RIGHTS IN THIS CASE, THE INTEREST OF THE STATE OF MISSOURI IN MAINTAINING A STRICT SEPARATION OF CHURCH AND STATE IS A COMPELLING STATE INTEREST OF THE HIGHEST ORDER WHICH WOULD JUSTIFY MINIMAL INFRINGEMENT.

For purposes of this section of their brief Petitioners would like to set forth again the pertinent excerpt from the First Amendment which is that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

Further broken down for purposes of this segment of the brief, the First Amendment says, in effect, "the State shall make no regulation prohibiting the free exercise of religion." Analysis of a free exercise claim involves a two-step process. It first must be determined whether or not governmental action creates a burden on the exercise of religion. If such an infringement on sincerely held beliefs is found, the action will be held violative of the free exercise provision unless there is a compelling state interest to override the protected interest. *Badoni* v. *Higginson,* 638 F.2d 172, 176-177 (10th Cir. 1980).

A. Respondents Can Show No Inference With Their Rights Of Free Exercise Of Religion.

Petitioners submit that they have not implemented a regulation prohibiting the free exercise of religion and Petitioners further submit that the Respondents' right to the free exercise of religion has not been prohibited. The trial court so found and its finding of fact should not be disregarded by this Court. *Meek* v. *Pittenger,* 421 U.S. 349, 392, 95 S. Ct. 1753, 1776, 44 L. Ed. 2d 217 (1975) (Brennan, J., concurring and dissenting). In fact, Judge Collinson specifically found that:

> "The facts before this Court simply to [sic] not establish that the 'practice' of holding religious services in a university-owned building is a matter of deep religious conviction to these plaintiffs." *Chess* v. *Widmar,* 480 F. Supp. 907, 917 (W.D. Mo. 1979).[12]

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[12] This is a factor which provides an additional manner of distinguishing this case from the recent decisions dealing with the Hare Krishna sect and the earlier cases which dealt with their historical

Petitioners have not prohibited Respondents from exercising their religion. The only thing that is contended by Respondents is that the University regulation in question merely makes their religious pursuits a little more "confused," a little less "comfortable" and a little less "convenient." (J.A. 18-19). Respondents and the other students appear to make no complaints whatsoever as to *interference* with their *beliefs*. This surely cannot be found to be equivalent to the "coercive effect" stated to be necessary in *Board of Ed. of Cent. Sch. District No. 1* v. *Allen*, 392 U.S. 236, 248-249, 88 S. Ct. 1923, 1929, 20 L. Ed. 2d 1060 (1968) and found in *Sherbert* v. *Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Petitioners have merely prohibited Respondents from exercising their religion on the campus of an institution of higher education, which is a constitutionally governed public corporation of the State of Missouri,[13] established, operated, maintained and funded by the tax dollars of the citizens of the State of Missouri, and to a lesser extent, the taxpayers of the United States,[14] all in accordance with constitutional mandates of the Constitution of

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predecessors, the Jehovah Witnesses. "The Hare Krishna religion imposes on its members the duty to perform a religious ritual known as Sankirtan, which consists of disseminating and selling religious tracts and soliciting contributions in public places." *Intern. Soc. for Krishna Conscious.* v. *Engelhardt*, 425 F. Supp. 176, 178, fn. 2 (W.D.Mo. 1977). The house to house distribution of printed books and pamphlets was likewise considered to be a religious practice of the Jehovah's Witnesses required by their literal reading of the Scriptures. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943).

[13] Article IX, Section 9a, Missouri Constitution of 1945. Section 172.020 RSMo (1978).

[14] For the budgetary year 1979-80, The University of Missouri system had an operating budget of $363,609,381. Of that amount, approximately 47%, or $178,417,989, was funded from State appropriations and approximately 10%, or $37,287,026, was funded from Federal appropriations.

Missouri and the First Amendment requirements of the United States Constitution. This is not an infringement of free exercise rights. *Johnson* v. *Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 17-18, 137 Cal. Rptr. 43, 52-53 (1977), *Hunt* v. *Board of Education of County of Kanawha,* 321 F. Supp. 1263, 1266 (S.D.W.Va. 1971) and *Lynch* v. *Indiana State U. Bd. of Trustees,* 378 N.E.2d 900, 904 (Ct. App. Ind. 1978), *cert. den.* 441 U.S. 946, 99 S. Ct. 2166, 60 L. Ed. 2d 1048 (1979). This Court, while strongly preserving the right of freedom as to religious beliefs, has indicated on several occasions that actions alleged to further those beliefs can be limited. *Cantwell* v. *State of Connecticut,* 310 U.S. 296, 303-304, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940), *Cox* v. *New Hampshire,* 312 U.S. 569, 578, 61 S. Ct. 762, 767, 85 L. Ed. 1049 (1941).

In this regard, it is interesting to note the words chosen by the writers of the First Amendment to our national Constitution. They spoke in terms of not "prohibiting" the free exercise of religion. Webster's defines "prohibit" as follows:

> "...to forbid by authority or command...to prevent from doing or accomplishing something: effectively stop...to make impossible...." *Webster's Third New International Dictionary of the English Language Unabridged* (G. & C. Merriam Co. 1976) p. 1813.

However, in regard to speech, press, assembly and the petitioning of government, the authors thereof spoke in terms of "abridging." Webster's defines "abridge" as follows:

> "...to dimish by reducing...to shorten in duration...shorten or cut down in extent..." *Webster's Third New International Dictionary of the English Language Unabridged* (G. & C. Merriam Co. 1976) p. 6.

The Constitution prevents more than just the "prohibiting" of these freedoms, they cannot even be diminished or shortened. Petitioners submit, conversely, that the rights to exercise

religion (in contrast to the rights to maintain religious beliefs) may be abridged although they may not be prohibited. Otherwise, the choice of words in the First Amendment has no meaning. It is beyond argument that the writers of the Constitution could have said

> "...or abridging the freedom of speech, or of the press, or the free exercise of religion...."

However, they made a conscious choice not to do so! Petitioners respectfully contend that the Court cannot ignore this conscious and premeditated choice of wording.

B. Missouri's Constitutional Interest In Maintaing A Legal Separation Of Church And State Provides A Compelling State Interest Justifying Any Minimal Interference Of Free Exercise Right.

Even assuming, arguendo, that the Court were to believe, contrary to the holdings of the trial court, that meeting on the campus was an integral part of the beliefs of the Respondents[15] and/or that their free exercise rights had been interfered with in some manner, Petitioners submit that they have a compelling state interest which mandates and thereby justifies any such alleged interference. The Court has recognized the need to provide for and protect such a compelling state interst. *Wisconsin* v. *Yoder,* 406 U.S. 205, 214, 92 S. Ct. 1526, 1532, 32 L. Ed. 2d 15 (1972). In fact, Chief Justice Burger, in *McDaniel* v. *Paty,* 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978) said:

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[15] As pointed out by Judge Collinson, the stipulations of the parties support at most, "...a finding that plaintiffs *prefer* having their religious services in a university-owned building to having the services in a building or home off-campus." *Chess* v. *Widmar,* 480 F. Supp. 907, 917 (W.D.Mo. 1979). It is interesting that one court indicates one of the grounds for the Eighth Circuit's decision in *Chess* was the fact that students frequently "...are unable to hold prayer meetings off campus." *Brandon* v. *Board of Ed. of Guilderland Cent. Sch.,* 635 F.2d 971 (2d Cir. 1980). However, there was no such evidence at the trial. In fact, the stipulated facts clearly indicated that the students continued to meet "about a block and a half from the campus." (J.A. 18).

> "The absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the *scope* of that protection since to do so might leave government powerless to indicate compelling state interest." *McDaniel, supra,* 435 U.S. at 627, 98 S. Ct. at 1328, footnote 7.

Petitioners would respectfully submit that the Constitution of the State of Missouri and its strict language with regard to the separation of Church and State required the action taken by Petitioners and thus provides a compelling state interest to Petitioners which would override any possible limited infringement upon Respondents' free exercise rights.

Missouri's first constitution, ratified in 1820, contained the following language:

> "...that no man can be compelled to erect, *support* or attend any place of worship...." Article XIII, paragraph 4 of the Missouri Constitution of 1820. (Emphasis added).

The second Missouri Constitution, the Constitution of 1865, included the above language at Article 1, Section X, and added the following:

> "no preference can ever be given, by law, to any church, sect, or mode of worship...." Article 1, Section XI of the Missouri Constitution of 1865.

A new section was added to the 1865 Constitution by the amendment of November 8, 1870. It was to be Section 10, Article IX and provided:

> "Neither the general assembly nor any county, city, town, township, school district, or other municipal corporation, shall ever *make any appropriation, or pay from any public fund whatever, anything in aid of any creed, church or sectarian purpose*...nor shall any grant or donation of personal property or real estate ever be made by state, county, city, town, or such public corporations, for any creed, church, or sectarian purpose whatever. (Emphasis added).

The next Constitution of the State of Missouri, which was adopted by the people of the State on October 30, 1875, to be effective November 30, 1875, was the Constitution of 1875. Section 6, Article II provided that "...no person can be compelled to erect, support or attend any place or system of worship...." Section 7 of Article II was new and it provided:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion... and that no preference shall be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship." Article II, section 7 of the Missouri Constitution of 1875.

Section 11 of Article 12 of the 1875 Constitution was the same as the language added to the 1865 Constitution by the amendment of November 8, 1870, discussed above.

In a special election on February 27, 1945, the people of the State of Missouri adopted the Constitution of 1945 of the State of Missouri, to be effective on March 30, 1945. This is the present Constitution of the State. The 1945 Constitution adopted without change the provisions discussed above. Article II, Section 6 of the 1875 Constitution, which traces its heritage back to 1820, was adopted as Article I, Section 6 in the new Constitution. Article II, Section 7 of the 1875 Constitution was carried over to Article I, Section 7 of the 1945 Constitution. Finally, Article 12, Section 11 of the 1875 Constitution became Article IX, Section 8 of the 1945 document. Thus is traced the heritage of the Missouri constitutional provisions before the Court in the case at bar.

Missouri's strict constitutional requirement of the separation of church and state, as evidenced by the review above, has been reviewed, discussed and upheld on many occasions by the Missouri Supreme Court. That Court has been very careful to preserve and protect this intent of the citizens of Missouri. One

of the first cases in Missouri to discuss these constitutional provisions was *Harfst* v. *Hoegen,* 349 Mo. 808, 163 S.W.2d 609 (Banc 1942). In *Harfst,* the Missouri Supreme Court reviewed whether or not a local school board could bring a parish school into the publec school system. Citing Article II, Section 6 of the 1875 Constiution, the Court conceded that "...our Constitution goes even farther than those of some other states." *Harfst, supra,* 163 S.W. at 613.

In *Berghorn* v. *Reorganized School District No. 8,* 364 Mo. 121, 260 S.W.2d. 573 (Banc 1953), the Missouri Supreme Court found that public tax monies were being unconstitutionally expended to assist parochial schools. In *Paster* v. *Tussey,* 512 S.W.2d 97 (Mo. Banc. 1974), *cert. den.* 419 U.S. 1111, 95 S. Ct. 785, 42 L. Ed. 2d. 807 (1975), the Court, after indicating that it was bound to follow the "dictates of the Missouri Constitution as now written," found a statute which authorized the lending of school textbooks to pupils and teachers who attend or teach in nonpublic schools to be unconstitutional. The Court, after a review of prior cases, said:

> "From all of which, it becomes readily apparent that the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." *Paster, supra,* 512 S.W.2d. at 101-102.

The position of the Supreme Court of Missouri seems clear.[16] While the Eighth Circuit, in cryptically disposing with this por-

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[16] See *Dorton* v. *Hearn,* 67 Mo. 301 (1878), *McVey* v. *Hawkins,* 364 Mo. 44, 258 S.W.2d 927 (1953) and *Special District for Ed. & Tr. of Hand. Child* v. *Wheeler,* 408 S.W.2d 60 (Mo. Banc 1966). The office of the Attorney General of the State of Missouri has issued several opinions in which Petitioners deem pertinent and which may be of interest to the Court. See *Op. Atty. Gen. No. 313,* Curtis 11-21-68, *Op. Atty. Gen. No. 337,* Graham 10-6-69, *Op. Atty. Gen. No. 265,* Reed 10-30-69, *Op. Atty. Gen. No. 82,* Marshall 9-2-70.

tion of the Petitioners' argument by use of a footnote, did in effect, totally ignore Missouri's serious and important constitutional interests and the numerous court decisions cases interpreting those interest, *Chess* v. *Widmar,* 635 F.2d 1310, 1321 (8th Cir. 1980) (Judge Bright and McMillian, dissenting), Petitioners would submit that the decisions of the Missouri Supreme Court are extremely relevant to this Court with regard to the question now before it. *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 274, 83 S. Ct. 1560, 1599, 10 L. Ed. 2d 844 (1963)(Brennan, J., concurring). Furthermore, Petitioners submit that the Court should not and cannot permit itself to entertain conjectures as to the wisdom or constitutional necessity of Missouri's interests in separation. *Waugh* v. *Board of Trustees of University of Mississippi,* 237 U.S. 589, 35 S. Ct. 720, 723, 59 L. Ed. 1131 (1915).

The federal judiciary have also had occasion to review and discuss Missouri's constitutional mandate of strict separation. In *Brusca* v. *State of Missouri ex rel. State Board of Education,* 332 F. Supp. 275 (E.D.Mo. 1971), aff'd. 405 U.S. 1050, 92 S. Ct. 1493, 31 L. Ed. 2d. 786 (1972), the federal district court was asked to consider the alleged invalidity of prohibiting the use of public funds to aid, directly or indirectly, religious or sectarian schools. The Trial Court recognized the will of the people of Missouri with regard to the use of state funds in and for religion or religious institutions and found the constitutional provisions valid as against the objections made by the plaintiffs.

In *Leutkemeyer* v. *Kaufman,* 364 F. Supp. 376 (W.D.Mo. 1973), aff'd. 419 U.S. 88, 95 S. Ct. 167, 42 L. Ed. 2d. 134 (1974), a case dealing with a challenge to Missouri statutes which provided transportation of public school pupils to and from school, but did not provide for similar transportation for pupils of church-related schools, the District Court not only recognized Missouri's stricter standard, but found it was an interest of a *compelling* nature. At page 386, the Trial Court said:

"We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, *is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional power,' within the standard enunciated in NAACP* v. *Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L.Ed.2d 405 (1963), and applied in *Sherbert.* That interest, in our judgment, satisifes any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States. *We likewise find and conclude that Missouri's interest in that subject is within Missouri's constitutional power and that such interest may properly be described as an 'interest in the highest order'* within the meaning of *Yoder* and within the meaning of all the other various descriptive terms set forth in United States v. O'Brien above quoted." (Emphasis added). See also *Epeldi* v. **Engelking,** 94 Idaho 390, 488 P.2d 860, 867 (1971), 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d (1972).

Petitioners would again contend that the freedom of exercise of religion is not absolute. Petitioners further submit that

"...there must be a 'balancing' and that the governmental interest may be paramount if it is 'compelling.' Sherbert v. Verner.... The elements of such a balancing test include, in addition to the importance of the governmental and religious interests, the degree of interference with the religious practice." *Linscott* v. *Millers Falls Company,* 440 F.2d 14, 17 (1st Cir. 1971), *cert. den.* 404 U.S. 872, 92 S. Ct. 77, 30 L. Ed. 2d 116 (1971). See also *LeReau* v. *MacDougall,* 473 F.2d 974, 979 (1st Cir. 1972), *cert. den.* 414 U.S. 878, 94 S. Ct. 49, 38 L. Ed. 2d 123 (1973).

In this case, the importance of the governmental interest has been undeniably established. Conversely, the interference with

Respondents religious practice, if any, can only be said to be minimal. The scales clearly tip in favor of upholding the Petitioners' regulation. See *Johnson* v. *Robinson*, 415 U.S. 361, 385-386, 94 S. Ct. 1160, 1175, 39 L. Ed. 2d 389 (1974), *Dittman* v. *Western Washington University*, ___ F. Supp. ___ (W.D.Wa. 1980), Slip Opinion, page 7.

IV. ALTHOUGH THE CAMPUS OF A TAX-SUPPORTED PUBLIC INSTITUTION OF HIGHER EDUCATION, INCLUDING THE BUILDINGS, SIDEWALKS AND GROUNDS THEREOF MAY BE A "PUBLIC FORUM" FOR SOME PURPOSES, THAT FACT DOES NOT REQUIRE THE TAX-SUPPORTED PUBLIC INSTITUTION OF HIGHER EDUCATION TO MAKE ITS FACILITIES AVAILABLE FOR THE REGULAR RELIGIOUS WORSHIP SERVICES OF OR FOR REGULAR RELIGIOUS TEACHING BY A RECOGNIZED STUDENT GROUP.

Judge Collinson determined that the only issue before him was the Petitioners' refusal to allow religious worship meetings in University buildings. *Chess* v. *Widmar*, 480 F. Supp. 907 (W.D.Mo. 1979). This determination is supported by the allegations of the complaint filed by the students (J.A. 47) and it was Petitioners' refusal to allow regular, religious worship meetings in the Haag Hall Annex[17] in January of 1977 that precipitated this litigation (J.A. 27). However, the Eighth Circuit considered the term "facilities" to be broad enough to include the "grounds" of the University. *Chess* v. *Widmar*, 635 F.2d 1310, 1318 (8th Cir. 1980). It was also stipulated by the parties that while Respondents did not make a formal request for use of a

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[17]Built in 1968, Haag Hall Annex houses 13 classrooms, 2 large lecture halls, a language lab and an astronomical observatory. The building also houses faculty and administrative offices. It is one of the largest and most heavily used classroom buildings at the University of Missouri-Kansas City.

University lawn or "open area" for their religious purposes in accord with regular University procedures, they were not, in fact, permitted to so use the lawn. (J.A. 27). However, Petitioners would contend that neither its buildings nor its lawn and open areas must be opened to regular religious worship or religious teaching by an organized student group. To allow such activities, would, in Petitioners' view, not serve to "...preserve...the traditional college environment and atmosphere conducive to effective education and learning." *American Future Systems* v. *State University,* 618 F.2d 252, 259 (3d Cir. 1980).

It is not a principle of constitutional law that "...whenever members of the public are permitted freely to visit a place owned or operated by the government, then that place becomes a 'public forum' for purposes of the First Amendment." *Greer* v. *Spock,* 424 U.S. 828, 836, 96 S. Ct. 1211, 1216, 47 L. Ed. 2d 505 (1976). As stated in *Wolin* v. *Port of New York Authority,* 393 F.2d 83 (2d Cir. 1968):

> "...where the issue involves the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further; does the character of the place, the pattern of usual activity, the nature of the essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views or issues of political and social significance. *Wolin, supra,* 392 F.2d at 89. See *Adderly* v. *Florida,* 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1967).

However, Petitioners submit that the inquiry in this case must seek a determination as to whether vel non the buildings and grounds of the University are "an appropriate place" for religious worship services or religious teaching as opposed to communication on "issues of political and social significance."

Of course, Petitioners would not dispute that certain constitutional guaranties of the United States Constitution are applicable to public colleges and universities. *Healy* v. *James,* 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972). Nor can Petitioners dispute that the campus of a public institution of higher education is built, maintained and operated with public dollars. In fact, this public support is basic to the establishment arguments made by Petitioners in Section I of this brief, *supra.* However, merely because the University is a "publicly funded place," it is not thereby transformed into an unlimited "public forum" where *all* manner of expression (as permitted on city streets and sidewalks, city plazas, or in a city park) must also be permitted. As stated in *Dunkel* v. *Elkins,* 325 F. Supp. 1235 (D.Md. 1971) at page 1243:

> "...it does not advance the analysis to suggest that because a University is owned by the public and ordinarily open to the public, decisions on what must be permitted in other places are automatically applicable for the University." Quoting Wright, The Constitution on the Campus, 22 *Vand.L.Rev.* 1027, 1040 (1969).

A. The Buildings And Grounds Of A Public University Are Not Readily Comparable To Areas Traditionally Considered To Be Public Forums.

Petitioners would submit to the Court that the campus of a public institution of higher education is dedicated to one special function: education. *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927, 933 (N.D.Ill. 1968), *Stacy* v. *Williams,* 306 F. Supp. 963, 969 (N.D.Miss. 1969). Petitioners would go one step further and contend that this dedication is for purposes of a *secular* education. This is an obvious conclusion under the *Wolin* criteria set forth above. The total character of the public university; the activities that take place there; the historical and statutory purpose of public universities; the needs, desires and wishes of those who go there, whether student (prospective, undergraduate, graduate or professional),

professor, administrator, staff or visitor (whether there for theatre, music, athletics, research, professional care, consultation or academic expertise) are all finely attuned to this *secular* education purpose. This considered commitment to one specific goal is not common to most areas considered public forums. Petitioners contend that the Court must remember this dedication to *secular* education and the activities which would normally be considered to be supportive of this dedication; because, in the final analysis, one of the Court's questions in this matter must be: is there a basis incompatibility between which is sought by Respondents and the primary activity of the University? *Grayned* v. *City of Rockford,* 408 U.S. 104, 116, 92 S. Ct. 2294, 2303, 33 L. Ed. 2d 222 (1972). *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302-303, 94 S. Ct. 2714, 2717, 41 L. Ed. 2d 770 (1974).

"College buildings are generally dedicated to classrooms, administrative offices, libraries, health centers, or dormitories. In all of these, order and study are expected." *Sword* v. *Fox,* 446 F.2d 1091, 1097 (4th Cir. 1971), *cert. den.* 404 U.S. 994, 92 S. Ct. 534, 30 L. Ed. 2d 547 (1971). This certainly is in contrast to a *train terminal* (where the people are there "...for the principal purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit***", *Wolin* v. *Port of New York Authority,* 392 F.2d 83, 89 (2d Cir. 1968), and the "...primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin, supra,* 392 F.2d at 90.); and *airport central terminal area* (which covers some 900 acres, is city-like in nature and which assists in accommodating approximately "22 million passengers" in one year, *Brashich* v. *Port Authority of New York,* 484 F. Supp. 697 (S.D.N.Y. 1979)); or *the National Mall* ("a public park that has regularly been made available to all major demonstrations presenting First Amendment values" covering such diverse gatherings as "Resurrection City, The Moratorium, The Farm Tractor Protest, etc." and is, as a matter of policy "openly available to the

Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to *all* others (religionists and anti-religionists)" *O'Hair* v. *Andrus,* 613 F.2d 931 (D.C.Cir. 1979).

Petitioners would additionally submit that a distinction can also be made between University "lawns" and "open areas" on the one hand and "public streets and parks" on the other. Again, the *Wolin* criteria make clear that these university areas under examination are devoted primarily to secular education. They are areas designed to facilitate the movement from one area of the campus to another. They are designed to aesthetically contribute to and support the secular education function and the many activities which that function encompasses. They are designed to provide a quiet place to review an assignment, prepare a lesson, or take a breather between, before or after classes. However, these campus areas are not generally considered to be areas open to all for all unrestricted purposes. The lawn and other open areas of a public university are not, and should not be, generally considered by anyone to be the real equivalent of a park and all that that term envisages.

B. A Public College Or University Is Not Required To Make Its Facilities Available For Purposes Of Regular Religious Worship Services Or Regular Religious Teaching Sessions Even If Its Buildings Or Grounds Are Determined To Be Public Forums.

In their dissent to the denial of Petitioners' Motion for Rehearing, Circuit Judges Bright and McMillian expressed their opinion on this topic as follows:

> "We entertain considerable doubt that cases which permit *expression of political and religious views* in public places require that state institutions make its [sic] facilities available for denominational religious services." *Chess* v. *Widmar,* 635 F.2d 1310, 1321-1322 (8th Cir. 1980). (Emphasis Added). See also Pfeffer, Church State and Freedom, page 682 (Beacon Press, rev. ed. 1967).

Petitioners concur and would respectfully submit that a careful reading of the opinions which have characterized locales as public forums reveals "...that their characterizations were always qualified, indicating that not every conceivable form of public expression would be protected." *Greer* v. *Spock,* 424 U.S. 828, 859, 96 S. Ct. 1211, 1228, 47 L. Ed. 2d 505 (1976).

Petitioners submit that the cases relied upon by the Eighth Circuit, and the cases which will undoubtedly be cited in support of Respondents' position are all either (1) cases dealing with areas traditionally viewed and considered as being open for "communicating thoughts between citizens and discussing public questions" and for use in "communication of views on national questions." *Hague* v. *CIO,* 307 U.S. 496, 515-516, 59 S. CT. 954, 964, 83 L. Ed. 1423 (1939), i.e. "...the streets, sidewalks, parks and other similar public places...." *Grayned* v. *City of Rockford,* 408 U.S. 104, 117 92 S. Ct. 2293, 2304, 33 L. Ed. 2d 222 (1972); or (2) cases actually concerned with the rights of free speech, press and/or assembly...not the dangers of the establishment clause.[18]

A case falling within the first grouping is, of course, *O'Hair* v. *Andrus,* 613 F.2d 931 (D.C.Cir. 1979). There should be no dispute that the National Mall area, because of its strategic location, and past historical usage, has become an area associated with protests, complaints, demonstrations, vocal out pourings

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[18]"Although some of the "Jehovah Witness" cases do speak in terms of *free exercise of religion,* Petitioners submit this was an unnecessary afterthought. As one author has written, "...the turn towards free exercise seems accidental. It simply made their opinions and articles sound better to include references to freedom of religion. The Witnesses were, after all, very unpopular people. The only thing about them with which conventional Americans could identify was their use of the language of Christianity. ***Against the background of events in Europe in the late '30's and '40's, religious freedom was a popular thing; why not get a bit of mileage out it by linking it with speech in protecting the embattled Witnesses." Morgan, *The Supreme Court and Religion,* pp. 73-74. (The Free Press 1972).

of outrage or concern. It is a open "park area" treated as such, and in fact, administered by the National Park Service. This area had previously been used for "religious activities." *O'Hair, supra,* 613 F.2d at 934, where the Court also indicated that about 100 permits per year were issued for such activities. Nevertheless, in spite of these facts, Judge MacKinnon was perceptive to the potential for constitutional abridgement.

> ". . . it cannot be concluded that because permits are issued for widely separated special events the government would thereby to be forced to issue permits for such activities on a *regular* basis. In other words, authorizing special events of a religious nature on widely separated occasions is one thing so far as the establishment clause is concerned and *to do so on a regular basis is another thing."* O'Hair, 613 F.2d at 938 (MacKinnon, Jr., concurring). (Emphasis Added).

The case of *Gilfillan* v. *City of Philadelphia,* 637 F.2d 924 (3rd Cir. 1980), also dealing with the Pope's historic 1979 visit to America, is interesting. Although use of the public city plaza for this special "pastoral mission" of the Pope was not challenged, the Court determined that the expenditure of funds to construct a platform and provide for certain other extraordinary assistance was an unconstitutional establishment.

The case of *Saia* v. *New York,* 334 U.S. 558, 61 S. Ct. 1148, 92 L. Ed. 1574 (1948) dealt with free apeech and whether or not the requiring of a permit for a loudspeaker or amplifier violated that right. While Saia was a minister of the Jehovah's Witnesses, there was no indication that he was conducting religious services, but only that he was giving *speeches* "on religious subjects." Furthermore, while the Court held the ordinance involved unconstitutional, the Court's subsequent decision in *Kovacs* v. *Cooper,* 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1949) does not leave *Saia* intact. See *Nietmotko* v. *State of Maryland,* 340 U.S. 268, 280, 71 S. Ct. 325, 332, 95 L. Ed. 267 (1951) (Frankfurter, J., concurring). In that case, the Court did

not deal with the issue of whether religious groups could be excluded from the use of the public park because the evidence was that permits had "always" been issued for religious organizations and Sunday School picnics. *Nietmotko, supra,* 340 U.S. at 272-273, 71 S. Ct. at 328. In light of this, it was no wonder that exclusion of only the Johovah's Witnesses was found improper. *Kunz* v. *New York,* 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 267 (1951), was another "free speech" case dealing with a "traditionally open" area and whether or not Kunz could speak without a permit, required by a city ordinance, prior to holding a religious meeting on the streets of New York. The Court said no after reviewing cases dealing with the usage of streets and parks. *Kunz, supra,* 340 U.S. at 293-295, 71 S. Ct. at 314-315. In *Tucker* v. *State of Texas,* 326 U.S. 517, 66 S. Ct. 274, 90 L. Ed. 274 (1946), the Court dealt with door to door visits in a village operated by the Federal government. *Tucker* did not discuss in any way the Establishment Clause, See also *Marsh* v. *State of Alabama,* 362 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). The case of *Spartacus, Etc.* v. *Board of Trustees of Illinois,* 502 F. Supp. 789 (N.D.Ill. 1980), held that the student union and outdoor walkways on the campus of the University of Illinois-Chicago Circle were "public forums." However, the case only dealt with the distribution of literature. Religion, or the establishment provision, was not involved in any way. Furthermore, the Court did acknowledge that the university areas *were* different than ". . .other types of public forums." *Spartacus, supra,* 502 F. Supp. at 799. Petitioners would submit these cases are not authoritative because of the glaring absence of establishment clause consideration.

Unfortunately, it cannot be said in this case that the ". . . freedom asserted by. . .[Respondents] does not bring them into collision with rights asserted by any other individual." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 630, 63 S. Ct. 1178, 1181, 87 L. Ed. 1628 (1943). The right of many, many others would clearly be infringed if the desired meetings were permitted in this case. . . and, just as important-

ly, the wall of establishment, so clearly conceptualized and designed, would, in the opinion of Petitioners, suffer a dangerous crack.

CONCLUSION

"Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn," *Lemon* v. *Kurtzman,* 403 U.S. 602, 625, 91 S. Ct. 2105, 2117, 29 L. Ed. 2d 745 (1971). Petitioners respectfully request that the Supreme Court "draw the line" in this case to indicate that the activities which Respondents seek to hold, with University aid and assistance, and the implicit approval of religion which results therefrom, are beyond the "verge" of constitutional power.

Petitioners submit that their brief indicates clearly that the University regulations under challenge in the case at bar and the actions of Petitioners in reliance thereon were constitutionally proper and therefore Petitioners respectfully ask that the judgment and opinion of the Eighth Circuit Court of Appeals in the case at bar be reversed and that judgment and opinion of the Federal District Court for the Western District of Missouri be ordered affirmed in its entirety.

Respectfully submitted,

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No. 80-689

In the Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, ET AL.,
Petitioners,

vs.

CLARK VINCENT, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does the refusal of the University of Missouri to accommodate voluntary student religious meetings, when all other student meetings are accommodated, violate the religious students' rights of equal access to a public forum protected by the Fourteenth Amendment?

2. Does the refusal of the University of Missouri to accommodate student religious meetings unconstitutionally abridge freedoms of speech, association, and exercise of religion?

3. Does the First Amendment Free Speech Clause protect voluntary, non-official religious speech by private individuals on public property to the same extent as speech dealing with secular subjects?

4. Would a state university's neutral policy of accommodating the activities of various special interest groups, without discriminating against religious actvities, constitute a violation of the Establishment Clause?

5. Does a policy of discrimination against student religious activities on campus violate the Establishment Clause by having a primary effect of inhibiting religion, while tending to involve the state in excessive entanglement with religion?

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19 *The Writings of Thomas Jefferson* (Memorial edition 1904) 17, 48

STATEMENT OF THE CASE

The University of Missouri, founded in 1839 and acknowledged as the oldest land grant college west of the Mississippi River, is a single state-wide University with four campuses, accommodating a total credit enrollment of some 53,151 students[1] from all racial, ethnic, and religious backgrounds. The University operates on an annual budget of over 360 Million Dollars,[2] offering programs leading to graduate, post-graduate and professional degrees.[3]

The total enrollment for the Kansas City campus (hereafter called UMKC) for the 1980-81 school year is 11,283[4], over 4,600 of whom are over 25 years of age.[5]

Students come to the University for various reasons, expecting the University to offer opportunities for education, personal development, broadening of outlook, and training for a career.[6] UMKC has responded to the needs of its students for extracurricular and cocurricular activities by accommodating the many (over 100) and varied autonomous special interest groups recognized by the University.[7]

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1. *The Facts - 1981* (University of Missouri System, 1981)

2. Brief of Petitioners, page 34, footnote 14.

3. Undergraduate Catalogue, UMKC, 1979-81 Edition, p. 10.

4. *The Facts - 1981* (University of Missouri System, 1981)

5. 1980-81 *Student Handbook*, UMKC, p. 5.

6. *Id.*, p. 12. It is suggested in the *Student Handbook* that there are four primary reasons for attending the University: 1) To get an education; 2) To learn about oneself; 3) to "finish school rapidly and get a career going"; and 4) to "meet people, have a good time, and develop yourself as a person." *Ibid.*

7. At the time this case was filed in the District Court (in 1977) there were over 90 recognized special interest groups. A. 43. (All references to the Joint Appendix herein are cited as "A. ___."). Presently, there are over 100 such groups. 1980-81 *Student Handbook*, p. 12.

The University concedes that it is important that the students' "social, cultural, entertaining, and service needs" be met though opportunities provided by the University.[8] The office of Student Life is "dedicated" to administering a wide range of cultural, social, educational, and recreational programs at UMKC.[9] Lectures, films, club sports, symposia, concerts, wilderness outings, seminars, domestic and international trips, Communiversity,[10] and student publications represent just a few of the many cocurricular and extracurricular programs which students plan and in which they participate.[11] The University boasts that "these programs provide an added dimension to the student's academic experience since they offer a valuable opportunity for personal development and growth in the area of interpersonal skills, social consciousness and leadership ability."[12]

The Office of Student Life is housed in the University Center, which is "dedicated to serving the social, cocurricu-

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8. The University acknowledges that if the University did not provide opportunities for such extracurricular needs, the needs would "go unmet." A. 43.

9. 1980-81 *Student Handbook*, UMKC, p. 10.

10. Communiversity is described in the *Student Handbook* as a "free university, funded by both the ASA [All Students Association] and the community." "It is an opportunity for students to become involved in both nontraditional studies and community affairs. Teachers (conveners) are all volunteers. There are no grades, no tuition, and no credits granted, and students help create their own learning environment." 1980-81 *Student Handbook*, p. 14. Communiversity also sponsors some events which appear to deal with religious subject matter. For instance, on December 3, 1977, Communiversity sponsored "Awakening—a film about Śri Chinmoy, Indian Spiritual Master." Admission was free, and the film was shown in Haag Hall Annex on the campus. *University News*, Volume 15, No. 11, November 17, 1977.

11. 1980-81 *Student Handbook*, UMKC, p. 10.

12. *Ibid.* The *Undergraduate Catalogue* also states that UMKC is "dedicated to extending the learning experience beyond traditional boundaries and to thinking in terms of education transcending the traditional concept of classroom and campus." 1979-81 Edition, pp. 10-11.

lar and cultural needs of UMKC".[13] The University Center at UMKC operates on annual budget of over 1 Million Dollars, about one-fourth of which comes from the student activity fees.[14] Most of its operating capital is derived from profit on food and vending machine services.[15]

Consistent with the cosmopolitan atmosphere of a public university, the Chancellor of UMKC states that the "open campus" has long been a traditional policy at UMKC.[16] The freedom "to demonstrate in an orderly fashion as a means of presenting views" also is recognized by the University, since "freedom of expression is one of the hallmarks of a democratic society."[17]

At issue in this case is the regulation of the University, applicable to all campuses, prohibiting the use of the buildings and the grounds of the University for purposes of "religious teaching" and "religious worship" by student or non-student groups.[18] This regulation was construed in this case to forbid the accommodation of student meetings on religious subjects where there is Bible exposition and an "atmosphere of worship".[19] University authorities further construed the rule to prohibit even an informal, small group Bible Study on the University lawn.[20] Although adopted in 1972, the regulation was not enforced against

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13. A. 39.

14. A. 45.

15. *Ibid.*

16. "Open Campus Statement," Chancellor George A. Russell, appearing in 1980-81 *Student Handbook*, UMKC, p. 10.

17. *Ibid.*

18. The entire regulation is set out at A. 29. In spite of the reference in the regulation to chapels on campus, there is no chapel at UMKC, although there is one at the Columbia campus, 125 miles east of UMKC.

19. A. 27.

20. A. 21-22, A. 27.

Cornerstone students until the start of the spring semester in 1977,[21] even though Cornerstone had been recognized as a student organization, and had been meeting on campus for religious purposes, for 4 or 5 years.[22]

The Cornerstone students are evangelical Christian students from different denominational backgrounds having common convictions about the truth and inerrancy of the Bible and the applicability of the scriptural commands to bear witness of Jesus Christ as God,[23] to teach the truth of the Bible[24] and to join together for individual growth through group worship and study of the Bible.[25] These students are insistent that their faith in God is pertinent to their everyday lives as students.[26] They state that it is relevant to all aspects of their lives, and affects their value decisions in areas such as interpersonal relationships, honesty in taking examinations, attitudes towards sex and marriage, responding to parents and others in authority, the choice of a career, and so on.[27] They believe the Bible literally as to the atoning death and bodily resurrection of Jesus Christ, and believe that the "answers to life's ultimate questions rest with Jesus Christ and the Bible."[28] At

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21. A. 27.

22. *Ibid.* During this time, the University did not have "full knowledge" of the religious activities which University officials later held to be in violation of the regulation in question. A. 27.

23. *E.g.*, Matthew 28:18-20; Acts of the Apostles 1:8; Luke 19:10; John 20:21 (King James Version)

24. *E.g.*, II Timothy 3:14-17 (King James Version)

25. *E.g.*, Hebrews 10:25 (King James Version) "Evangelicalism stresses the Reformation doctrine of salvation solely by faith in Jesus Christ. It has frequently implied acceptance of the literal truth of the Gospels and a personal experience of Jesus Christ as Lord and Savior" *Encyclopedia Americana*, Vol. 10, Evangelicalism (1978 ed.) p. 715.

26. A. 17.

27. *Ibid.*

28. A. 18.

the heart of their strong convictions is a missionary and evangelistic purpose to "promote a knowledge and awareness of Jesus Christ *on the campus*" (emphasis added), and therefore they seek to attract the uninvolved and uncommitted student to their meetings.[29]

Over the years since their formation as a campus organization, the Cornerstone students have met at different times for small group Bible studies, and have also held larger weekly meetings which included Bible study and teaching, prayer, informal sharing and singing.[30] The group has never sought nor received any official university promotion, assistance, or sponsorship from administration or faculty, the group's activities and thrust having been entirely autonomous and self-directed.[31]

In January, 1977, as they had customarily done at the beginning of each semester, the Cornerstone students submitted a request for the use of a classroom in a university building for the purpose of a regular Saturday night meeting.[32] On this occasion, instead of approving the request as in the past, the administration requested more information on the activities to be conducted at the meeting.[33] It is undisputed that the activities conducted at the meeting are religious in nature, that many of the students have an attitude of worship, and that belief in Jesus Christ as God is openly advocated.[34] After receiving a straightforward description of the meetings, the University concluded that such meetings would violate the reg-

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29. A. 17.
30. A. 34.
31. A. 18.
32. A. 27, 30-31.
33. A. 27.
34. A. 33-35.

ulation prohibiting religious teaching and religious worship, and therefore denied the request.[35] A short time later, these students requested permission to have a small group Bible study of approximately 20 students on the lawn of the University grounds.[36] Again permission was denied, with the regulation discussed above being offered as the sole justification for such action.[37] From the denial of these requests until the regulation was invalidated by the Eighth Circuit Court of Appeals in August, 1980, the students involved in Cornerstone were not permitted to meet on campus for religious purposes.[38] They were not permitted to hold small group Bible Studies or to hold their larger weekly meetings on the campus.[39] During this period of time, the students were forced to move their meetings off campus with disadvantageous effects, including a loss of visibility and identity as a campus organization; increased confusion; decreased comfort and decreased ability to attract interested visitors; lack of convenience; the fact that their message was made to seem more remote and less relevant to the typical student; and a decrease in attendance.[40]

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35. A. 27.

36. A. 21.

37. A. 22. Interestingly, the students were initially advised that they could hold the Bible study provided they promised to present "all possible views of the Bible fairly, and not talk about just one view of the Bible." A. 21.

38. 18. Following the decision of the Eighth Circuit Court of Appeals, the University regulation was reluctantly suspended under threat of additional legal action. Petitioners' Brief, p. 9.

39. *Ibid.* The regulation has also been enforced so as to prohibit Bible studies in the University Center cafeteria. When the students attempted in February, 1980, to hold a Bible study in the cafeteria, their attorney was advised by the University that any regular meetings to "study the Bible" are "within the purview of Judge Collinson's [the District Court Judge] opinion and the University regulation . . . ." Letter from Ted D. Ayres to James M. Smart, Jr., dated February 13, 1980.

40. A. 18-19.

The District Court held that the regulation was required by the Establishment Clause.[41] The Court of Appeals, noting that religious speech, and the right to associate for the advancement of religious beliefs, are protected by the First Amendment, unanimously[42] reversed the District Court decision. The Eighth Circuit held that the Establishment Clause did *not* require such a regulation as the one in question. The court further held:

> In contrast with a neutral policy, UMKC's current regulation has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion. . . The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits its religious groups.[43]

Finally, a word about what this case is *not* about. The case does not involve an off-campus group unrelated to the University trying to use the facilities at the University. Nor does the case involve any transfer of funds either from the public treasury of the State of Missouri, from the public treasury of the United States, from the Student Activities budget, or from anywhere else. The case does not involve faculty or administration sponsorship of any religious meetings, since the University encourages, and the Cornerstone students engage in, "self-directed activity."[44]

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41. Opinion, Appendix to Petition for Writ of Certiorari, at A. 47.

42. Two of the Eighth Circuit Judges dissented from the denial of rehearing. A. 21-24, Appendix to Petition for Certiorari (635 F.2d 1320-22).

43. Opinion, Appendix to Petition for Writ of Certiorari, at A. 14.

44. A. 39. The University is careful to point out that it does not approve or sponsor the aims or purposes of any special interest group, stating that:

(Continued on following page)

The case does not involve any disruption or interference with the academic purposes or atmosphere of the University.[45] Nor does the case involve an effort by these students to obtain any greater accommodation for the meetings of their special interest group than that provided for other special interest groups on campus. Rather, this case simply involves the right of these religiously motivated students to use the buildings and grounds of the University, just like the students in other special interest groups, on an equal basis, without favoritism or opposition from the administration, so that they may pursue their own special interest, and attempt to communicate their message to all who are willing to attend and listen.

Footnote continued—

> The University shall not be used for commercial or promotional advertising purposes, nor will the name of the University be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members, but an exception may be made by the Board of Curators upon the recommendation of the president of the University. When an exception is made, the conditions for using the name will be prescribed. 1980-81 *Student Handbook*. UMKC, p. 25.

45. The record is silent as to any such disruption. It is not without significance that during the years Cornerstone did meet on campus, the University officials did not have "full knowledge" of the religious teaching and religious worship occuring at such meetings. A. 27. Moreover, the record is silent as to any problems or difficulties encountered by any universities which permit religious activities on campus, such as the University of Minnesota and the University of California. According to a study completed in 1978, approximately 43 per cent of tax supported universities have policies that allow recognition of student religious groups on campus. Although the data was not specific as to this issue, apparently most of the universities granting official recognition to religious groups also permit the groups to have access to university facilities for religious activities. Walls, W. J., *University Provisions for the Practice of Religion: Update 1978*, Doctoral dissertation, Ball State University, 1978. See also Jones, *The Public University and Religious Practice: An Inquiry into University Provision for Campus Religious Life* (Ball State University, 1973) (published monograph), for a more general description of the entire range of policies related to accommodation of student religious activity at both public and private universities.

SUMMARY OF THE ARGUMENT

1. The University's prohibition against religious teaching and religious worship directly burdens rights of free speech, association, and exercise of religion, and therefore can be justified only by a compelling state interest of sufficient constitutional value to override all of the freedoms in question.

2. The Establishment Clause provides no justification for the regulation because the religious expression in question is that of private individuals in a public forum. A neutral policy of accommodating all viewpoints in a public forum does not constitute governmental sponsorship or favoritism of any of the viewpoints expressed in the public forum.

3. There is no financial support to religion provided by a refusal to discriminate against religious speech and activities in a public forum. Any benefit to religion from such a policy is simply incidental to the University's purpose in encouraging personal intercommunication and a free exchange of ideas.

4. The Missouri Constitutional provisions say nothing about the use of public property on an equal basis by religious groups, and therefore cannot be used as a justification for the policy. Even if the Missouri Constitution did express such a concern, the provision would have to be invalidated in the face of the fundamental First Amendment interests burdened by the regulation.

5. Instead of being required by the Establishment Clause, the University's regulation violates the Establishment Clause because its primary effect is opposition, hostility, and invidious discrimination against traditional religious expression.

ARGUMENT

I.

THE REGULATION VIOLATES THE STUDENTS' RIGHT OF EQUAL ACCESS TO A PUBLIC FORUM PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

A. The Regulation Imposes an Illegal Content-Based Restriction Against a Particular Category of Speech in a Public Forum.

The University of Missouri, like other public universities in this country, is a place where students are told that they are permitted and encouraged to think, to examine, to discuss, to evaluate, to test, to challenge, and to prove all kinds of values, viewpoints, philosophies, and ideas.

UMKC also seeks to accommodate the non-academic needs of the special interest groups, small as well as large, within the 11,000 member university community, recognizing that the university "must also be responsive to the various ethnic and non-academic special interest groups within the university."[46] Access to meeting rooms is controlled by established administrative procedures[47] in order to provide for orderliness, but the university makes no pretense at restricting the content of the discussions and ac-

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46. A. 43. For the sake of convenience, the petitioners (the dean of students and individual members of the Board of Curators) will be referred to herein as "the University."

47. The student organizations may make application for regular use of space, or may apply for one-time use. Regular use of space is apparently granted for a maximum period of one semester at a time. In addition to the right of recognized student organizations to meet on campus, there is also provision for "ad hoc" groups of students to meet, provided the chancellor evaluates and approves their request. 1980-81 *Student Handbook*, p. 25.

tivities at the proposed meetings of the recognized student organizations, with one exception: the absolute prohibition against religious teaching and worship.

There can be no question that the university has created what is, for constitutional law purposes, a "public forum" in its program promoting special interest group activities. The Eighth Circuit had no difficulty finding that the University had "created an open forum for the activities of its recognized student groups."[48]

This Court has, in the last two decades, clearly set forth the doctrine that once the state has opened a forum for some purposes, the forum may not be denied to other groups or individuals solely on the basis of the subject matter of their proposed discussions. This concept is noted in *Cox v. Louisiana*, 379 U.S. 536 (1965), where the Court struck down a practice which gave discretion to local police to approve or reject proposed demonstrations according to their subject matter. The concept was more distinctly articulated in *Police Department v. Mosley*, 408 U.S. 92 (1972), where the Court held unconstitutional an ordinance which permitted labor picketing in a certain location, but not picketing with regard to other matters. Striking down the ordinance under the Equal Protection Clause, the court stated:

> "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on con-

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48. Opinion at A. 11 of Appendix to Petition for Certiorari; 635 F. 2d at 1310, 1316.

tent alone, and may not be justified by reference to content alone." 408 U.S. 96.

Healy v. James, 408 U.S. 169 (1972), decided the same day as *Mosley*, certainly made clear that speech and associational activities of student special interest groups enjoy a full measure of First Amendment protection. Actually, a case decided three years earlier is even more in point with regard to the fact that the Equal Protection Clause protects the rights of university students to be free from government restrictions discriminating against religious content. In that case, *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969), a three judge court struck down a number of regulations of the University of Mississippi dealing with invitations to outside speakers. One of the regulations provided that "facilities of the University shall not be made available for public religious meetings . . ." The Court struck down the regulation stating:

> ". . . as this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics which prohibition would conflict with the Equal Protection Clause, it must be rejected . . ." 306 F. Supp. at 975-96.

The doctrine of "equal access to a public forum" is a doctrine rooted in both the Free Speech Clause of the First Amendment and in the Equal Protection Clause of the Fourteenth Amendment.[49] The range of the expression which must be accommodated in a public forum is identical to the range of the protection afforded by the Free Speech Clause. In other words, if the speech is constitutionally protected speech, it cannot be excluded from the forum on the basis of any asserted interest applicable to the

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49. See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

subject matter.[50] Here, if we compare the student activities meetings to streets and parks,[51] where communication is somewhat infrequent and often incidental, or to airports and bus terminals,[52] where people go primarily for transportation and rarely for communication, the conclusion is inescapable that the University has created a forum for the expression of ideas and for intercommunication between students.

In this case, the University of Missouri has adopted and enforced a regulation which directly, and firmly, discriminates against religious speech and exercise. The University must bear the burden of justifying the content-based restriction by clearly demonstrating that the prohibited expression is not protected by the Equal Protection Clause, the Free Speech Clause, or by the Free Exercise Clause. Certainly there is no allegation that the speech proposed by these devout students is unprotected by virtue of being obscene, defamatory, disorderly, fraudulent, or

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50. In spite of the very broad language of *Mosley*, we do not contend that *anything* can be said in a public forum, as the Chief Justice pointed out in his concurring opinion in *Mosley*. Some have argued for an even broader interpretation of the "public forum" concept—that *no* discrimination on the basis of subject matter should be tolerated. See Kalven, *Upon Reading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. Law Rev. 428 (1967). See also Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1. We do not find it necessary to make such an argument, nor do we believe that to be the law. However, we do submit that a public forum is simply a place where any content restriction will be presumptively invalid if it affects any form of speech which is ordinarily protected speech, and that the government will have the burden of showing that the speech in question is somehow not protected by the First Amendment.

51. *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

52. *Wolin v. New York Port Authority*, 392 F. 2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *ISKCON v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977); Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233.

that it comes within any other category of speech by private individuals which has been ruled to be unprotected. The justification for the restriction, according to the university, is wholly derived from the federal Establishment Clause and the Missouri policy of strict separation of church and state. If the University does not sustain its heavy burden in this Court of demonstrating that this speech is *not* protected speech, then this case is clearly and easily controlled by *Healy* and *Mosley*, and the regulation must be struck down.

B. The Free Speech Clause Protects the Voluntary, Non-Official Religious Speech of Private Individuals.

At stake in this case is nothing less than the question of the degree of esteem that we, as a people, place upon free exercise of religion, and, indirectly, the degree of esteem we place upon the role of religion in our society. For what the University really argues is that religious speech by private (non-official) individuals is entitled to less protection than speech on secular subjects.[53]

Why does the University seek to exclude the Free Speech Clause from the analysis? Clearly, the restriction on religious speech is easier to justify if free speech considerations are excluded. Free speech carries with it certain concomitant rights not ordinarily associated with free exercise, including the right to hear and the right to know.[54] If these concepts can be ignored, and the

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53. The District Court accepted this argument, concluding that "secular intellectual liberties" were entitled to a higher degree of protection than "religious activity" 480 F. Supp. 907, at 918.

54. The right to associate for the advancement of beliefs is actually *both* a free speech right and a free exercise right. See *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975),

(Continued on following page)

focus placed on *religion* rather than on *speech*, then the only concern is the degree to which the exercise of the students' religion is burdened. Then the University can restrict its analysis to showing a compelling state interest which it claims to be of greater weight—in particular, the interest in nonestablishment of religion. If, however, in addition to the burden on religious exercise, the regulation inhibits rights of the students to speak, to hear, to know, and to associate for the advancement of their beliefs, in addition to burdening the right to the free exercise of their religion, then the University must demonstrate a state interest of sufficient weight to override the total constitutional value of all of the individual freedoms restricted by the regulation. Moreover, some of the lower courts have had a tendency to find that the religious exercise of the students is not constitutionally burdened if they can engage in their religious practices off the campus[55]. But in speech cases, this Court has found immaterial the fact that the speech could be exercised elsewhere.[56]

Footnote continued—

cert. denied, 424 U.S. 934 (1976), *reh. denied*, 425 U.S. 945 (1976); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951) at 293. The student's right to hear and his right of academic freedom (also derived from the Free Speech Clause) include his right to explore religious ideas and experiences. See Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II*, 81 Harv. L. Rev. 513, 581-587 (1968).

55. *E.g.*, *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979), *rev'd*, 635 F. 2d 1310 (8th Cir. 1980); *Dittman v. Western Washington University*, ... F. Supp. ....., Cause No. 79-1189V (W.D. Wa. 1980) (appeal docketed, 9th Cir., No. 70-3120, Apr. 7, 1980). *Contra*, *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975), *cert. denied*, 424 U.S. 934, *reh. denied*, 425 U.S. 945 (1976).

56. The regulation is not a "time, place, and manner" restriction. It is a total exclusion from one forum based on content. The fact that the students can hold religious meetings elsewhere is immaterial. *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939); *Healy v. James*, 408 U.S. 169 (1972).

For these reasons, it is significant to the analysis to determine whether the religious speech in this case is protected by the Free Speech Clause as well as the Free Exercise Clause.

The result of the University's view is that the protection afforded the right of the students to advocate a religious point of view on campus is reduced *below* the protection afforded their right to advocate radical politics or a homosexual lifestyle. In fact, the freedom to advocate belief in God is reduced far below the freedom to advocate atheism or agnosticism.[57] The argument is, of course, that the Constitution does not forbid aid to groups advocating secular viewpoints,[58] but that the Constitution does forbid aid to any group advocating a religious viewpoint. Therefore, it is "just too bad" about those religious students! Even though they, too, have enrolled in the University and have paid their student activity fees, and even though the University has taken care to see that all other extracurricular and cocurricular needs will not go unmet, they cannot even be permitted to sit on the lawn to study their Bibles!

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57. Although this Court has applied a broad definition of "religion" for free exercise purposes in cases much as *Torcaso v. Watkins*, 367 U.S. 488 (1961), and although the Third Circuit has gone some distance in that direction in *Malnak v. Yogi*, 440 F. Supp. 1284, 1319 (D. N.J. 1977), *aff'd per curiam*, 592 F. 2d 197 (3d Cir. 1979) (holding teaching of TM in the schools to be a violation of the Establishment Clause), it is unlikely that the University would adopt and attempt to enforce a very broad definition of religion for purposes of this regulation. It is unthinkable that any attempt to do so would be successful without causing a major uprising and a flurry of litigation. As a practical matter, the "freedom of anti-religion" on the campus is virtually absolute.

58. The validity of this contention is analyzed in Section III below.

1. History shows that private, non-official religious speech was intended by the drafters of the Bill of Rights to enjoy as much constitutional protection as speech on other matters.

As a people, even considering our many different social, ethnic, cultural, and religious backgrounds, we have always felt that the pursuit of religion and religious concepts is among the loftiest and noblest of all pursuits.[59] We have always believed that one of the chief duties of government is to *protect* our right to discuss religion, to explore religious concepts, and to respond to the dictates of our own conscience in practicing those beliefs.[60] The framers of the First Amendment uniformly endorsed the value and importance of the pursuit of religious questions and concerns, however they might have individually defined their religious beliefs.[61]

Conditions to day are different from those at the time of the First Amendment, but we cannot ignore the basic

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59. ". . . [T]he relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation." 19 *The Writings of Thomas Jefferson* (Memorial edition 1904), p. 414.

60. *Engel v. Vitale*, 370 U.S. 421 (1962) (opinion of Justice Black); *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg and Harlan, JJ., concurring).

61. The third article of the 1780 Massachusetts Declaration of Rights expressed some of the prevailing sentiment of that day: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality . . ." Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 5 (Oceana 1973). Thomas Jefferson, regarded as a strict proponent of nonestablishment and author of the "wall of separation" concept, proposed accommodation of sectarian "instruction" and "worship" for interested students within the "precincts" of the University of Virginia. 19 *The Writings of Thomas Jefferson* (Memorial ed. 1904) 449, quoted in *McCollum v. Board of Education*, 33 U.S. 203, 245 (1948) (Reed, J., dissenting).

human values underlying the amendment, which clearly place a high regard on the role of religion. Any argument that religious speech is not entitled to the same degree of protection as other speech fails to take into account the realities of history.

2. The decisions of this Court establish that private religious speech enjoys as much protection as any other speech.

In 1939, in a case involving religious canvassing by a Jehovah's Witness who refused for religious reasons to obtain a permit which was required for any kind of canvassing, this Court, applying a free speech analysis, invalidated the regulation. *Schneider v. State (Town of Irvington)*, 308 U.S. 147. The next year, in the landmark decision of *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the free exercise clause into the Fourteenth Amendment) the Court reversed a breach-of-the-peace conviction of another Jehovah's Witness minister, noting that "the fundamental law declares the interest of the United States that the free exercise of religion be not prohibited *and* that freedom to communicate information and opinion be not abridged."[62] (emphasis added). In other words, the Court again used both the Free Exercise Clause and the Free Speech Clause to invalidate the action of the State.

In many other cases since then, the Court has struck down restrictions against religious speech without ever considering the possibility that private, non-official religious speech is protected *only* by the Free Exercise Clause, and

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62. The Court, commenting on *Cantwell*, has confirmed that that case also "invoked interests protected by the First Amendment's guarantee of *freedom of speech*." *Village of Schaumburg v. Citizens for a Better Environment*, ... U.S. ....., 100 S. Ct. 826, 831-832 (1980). (emphasis added).

not also by the Free Speech Clause.[63] *E.g., Murdock v. Pennsylvania,* 319 U.S. 105 (1943) (ordinance requiring religious colporteurs to pay a license tax struck down); *Tucker v. Texas,* 326 U.S. 517 (1946) (Jehovah's Witness minister going door to door presenting religious views and literature—prosecution under statute held to infringe freedom of religion *and* freedom of the press); *Marsh v. Alabama,* 326 U.S. 501 (1946) (same facts as *Tucker,* except town privately owned); *Saia v. New York,* 334 U.S. 558 (1948) (restriction on use of sound amplification device challenged by religious group and invalidated as a "prior restraint"), *Kunz v. New York,* 340 U.S. 290 (1951) (law requiring a permit to hold a religious meeting on the streets invalidated); *Niemotko v. Maryland,* 340 U.S. 268 (1951) (refusal to grant permission for "Bible talks" in public park held a prior restraint and a denial of equal protection). In *NAACP v. Alabama,* 357 U.S. 449 (1958), this Court, discussing the freedom to associate for the advancement of beliefs, stated: "[o]f course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters . . . 357 U.S. at 460-461. (emphasis added). And with regard to the use of public property for religious speech, the Court has stated:

> "In considering the right of a municipality to control the use of public streets *for the expression of religious views,* we start with the words of Mr. Justice Roberts that 'wherever the title of streets and parks may rest,

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63. The right *not* to express a view has been protected on free speech grounds also, even though the refusal to express the mandated sentiment was based *strictly* on religious convictions. *West Virginia v. Barnette,* 319 U.S. 624 (1943) (requirement that school children join in flag salute ceremony); *Wooley v. Maynard,* 430 U.S. 701, 97 S. Ct. 1428 (1977) (requirement of bearing state motto "Live Free or Die" on license plate held unconstitutional).

they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of *assembly, communicating* thoughts between citizens, and *discussing* public questions.' " (citing *Hague v. C.I.O.*, 307 U.S. 496 (1939)). *Kunz v. New York, supra,* at 293. (emphasis added).

"[T]here is no constitutional bar to the use of government property for religious purposes. On the contrary, this Court has consistently held that the *discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. Abington School District v. Schempp,* 374 U.S. 203, 314 (1963) (Stewart, J., dissenting) (emphasis added).

"Government may not interfere with efforts to proselyte or worship in public places." *McDaniel v. Paty,* 435 U.S. 618, 640 (1978) (Brennan, J., concurring).

Since the Court has regarded religious speech as also enjoying the protection of the Free Speech Clause, it follows that the Court has also seen fit to use the Equal Protection Clause to invalidate restrictions against religious speech in public places. *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Fowler v. Rhode Island,* 345 U.S. 67 (1953) (Frankfurter, J., concurring). In view of the foregoing, it seems fair to say that, if the Free Speech Clause and the Equal Protection Clause do not afford the highest degree of protection to private (non-official) religious speech, it will come as a very definite surprise to this Court![64]

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64. A number of other courts have also recognized that free speech and free exercise go hand in hand when we are talking about speech with religious content. *O'Hair v. Andrus,* 613 F. 2d 931 (D.C. Cir. 1979) (the court refused to interfere

(Continued on following page)

3. The key distinction is between governmental speech and speech by private individuals.

The Establishment Clause was aimed at keeping the government from exercising any jurisdiction over matters of religion.[65] It had nothing to do with rights of communication between citizens, which were protected by the Free Speech and Free Press Clauses, as well as the Free Exercise Clause. Therefore, to the extent that the Establishment Clause was directed at speech at all, it was directed at official, governmental speech, not the non-official speech of private individuals.

In order to protect minority religious viewpoints consistent with the value of the Establishment Clause, this Court has, on occasion, found it necessary to invalidate governmental religious expression. The problem in *Abington Township School District v. Schempp*, and *Engel v. Vitale*, was not that *someone* was reading the Bible, or praying, on school property. The problem was *who* was doing it. What troubled this Court in those cases was that when a teacher stands in front of a class and follows *the directives of State law* as to a prayer or Bible reading, the whole authority and prestige of the State is placed behind the message. The Court found that the result is

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Footnote continued—

with the Pope's service and sermon on the National Mall, basing the decision on both free speech and free exercise grounds); *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969) (striking down, on equal protection grounds, restriction on religious speakers on campus); *Love v. Mayor*, 448 F. Supp. 128 (D. Wyo. 1978) (restriction on solicitation applied to religious activity without distinguishing it from other activity protected by the First Amendment); to the same effect are *Levers v. City of Tullahoma*, 446 F. Supp. 884 (E.D. Tenn. 1978); *Tate v. Akers*, 409 F. Supp. 978 (D. Wyo. 1976), *aff'd*, 565 F. 2d 1166 (10th Cir. 1977).

65. *Everson v. Board of Education*, 330 U.S. 1, 28 (1947); *Engel v. Vitale*, 370 U.S. 421 (1962).

a degree of sponsorship and coercion which was deemed incompatible with the purposes of the Establishment Clause. In practical effect, the Court found the State in those cases to be promoting religion.

A helpful illustration of the difference between official and non-official speech is presented in *O'Hair v. Paine*, 312 F. Supp. 434 (W.D. Tex. 1969), *aff'd per curiam*, 432 F. 2d 66 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). In that case, Madalyn O'Hair sought an injunction on Establishment Clause grounds against the National Aeronautics and Space Administration to restrain NASA from permitting the astronauts to engage in religious commentary during the Apollo flights. The court rejected the contention that the Establishment Clause required such a restriction, noting that NASA was not promoting or sponsoring such comments, and that the astronauts were simply relating their personal views in their capacity as private individuals. Since there was no attempt by NASA to sponsor such statements, and since the astronauts were not regarded as speaking *officially*, there was no governmental approval or sponsorship, and no basis for invoking the Establishment Clause.

We do not deny that the Establishment Clause can be invoked against private speech under some circumstances, but that will be true only in rare cases where the government has sponsored, promoted, and involved itself with the private speech by affirmative acts constituting favoritism or support of religion. If the government has taken such affirmative steps, then it is fair to restrict the private speech because of the governmental involvement. But if the government has taken no affirmative steps (as in *O'Hair v. Paine, supra*), then there can be no logical or just basis for restricting private speech. Thus, a minister preaching a sermon to passers-by

on the steps of City Hall, operating without an invitation from city officials, and receiving only the same accommodation as all other speakers on all other topics, presents a very different picture for constitutional purposes from that of a minister *being singly invited* by city officials to preach a sermon on the steps. An example of a case where the Court found a prohibited level of governmental sponsorship and involvement is *McCollum v. Board of Education*, 33 U.S. 203 (1948). In that case, a school board affirmatively agreed with an inter-faith council to provide religious instruction periods in the classrooms during regular class time, to be taught by outside religious instructors approved by the superintendent of schools. Those not wishing to participate were permitted to go elsewhere for secular instruction. Although the religion teachers were not employed by the school board, the Court found the arrangement to be such that it was practically the same as if the religious instruction was conducted by the school board itself.[66]

McCollum, therefore, is more like our example of the minister *being singly invited* to preach a sermon on the steps of City Hall. The case before this Court now, however, is more like the situation where a minister simply seeks to avail himself of facilities already available and already used for many other expressive activities.

Assume for a moment that instead of arranging for religious instruction in the schools in *McCollum*, the school

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66. It is overly simplistic to assert that the difference between the "released time" program approved in *Zorach v. Clauson*, 343 U.S. 306 (1952), and the program disapproved in *McCollum* was the physical location of the instruction *per se*. It is true that the physical location was significant, but it was primarily because of the effect that the physical location had on the young students' perception of *who was sponsoring the instruction*. The Court also found it inappropriate to use tax-supported property for this instruction, but the Court would not have been so concerned if the programs had been a "public forum" of "self-directed" activity. See discussion as to the financial support element of the Establishment Clause in Section III below.

board had simply set aside an hour for the students to engage in unsupervised "self-directed activity" of any kind. Let us assume that among the things the students engage in are discussions of sports, politics, religion and atheism. Now, let us assume Mrs. McCollum brings her suit, claiming the Establishment Clause is violated because some of the students advocate belief in God. What is the result? She loses—it is private, non-official speech, and there are no governmental actions attempting to promote or sponsor religious activity—the school is just accommodating the students in whatever they want to do, on the assumption that personal interaction among students has value in itself. This Court and other courts are very sensitive to official government actions of favoritism toward religion. *E.g., Stone v. Graham,* 101 S. Ct. 192 (1980) (legislature required posting of Ten Commandments in classroom). But in this case, the students are not asking for any favoritism or sponsorship—all they desire is equal accommodation.

C. The Regulation Violates the Students' Right to Speak, Right to Hear, and Right to Associate for the Advancement of Their Beliefs.

In this case, students were notified that religious content in student meetings was prohibited—at least certain kinds of religious content—and they were denied the use of the buildings and the grounds. If they had decided, in spite of such denial of permission, to hold a Bible study in violation of the University's regulation, they would have subjected themselves to disciplinary penalties which could have affected their entire future.[67]

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67. In response to a question from the students' attorney regarding the applicability of disciplinary sanctions to students violating the regulation in question, the University replied that "normal University procedures relating to violations would be pursued with regard to Cornerstone." Letter of Ted D. Ayres to James M. Smart, Jr., dated March 31, 1980.

The regulation restricts the rights of the students to discuss religious concepts with one another, revealing a remarkable indifference to the essential value of discussion and intercommunication among students. *Tinker v. Des Moines School District*, 393 U.S. 503, 512, (1969).

The regulation also restricts the right to hear, a right which has been recognized as being at the core of the Free Speech Clause.[68] Students attending a public university have a right to be exposed to religious ideas and religious activities as well as all other ideas and activities which compete for their attention and allegiance. The "equality of status in the field of ideas" mandates that there be no restriction on the right of students to explore religion as well as non-religion. Here, the regulation affects not only the rights of the student interested in religion, but also the rights of the irreligious and the skeptical. Thus, the regulation ignores the possibility that certain students may wish to attend the Cornerstone meetings in order to challenge certain concepts, or to voice disapproval, or even, perhaps, to do research for a term paper on the sociology of university religious groups. It is manifest that the University could not order removal from the library of all Bibles and materials dealing with religious concepts, merely for the purpose of suppressing study of religious matters.[69]

In all the cases involving freedom of expression and freedom of association on the university campus, it has been

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68. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Brooks v. Auburn University*, 296 F. Supp. 188, 192, 199 (M.D. Ala. 1969); *James v. Nelson*, 349 F. Supp. 1061 (N.D. Ill. 1972).

69. See, generally, *Developments—Academic Freedom*, 81 Harv. L. Rev. 1045 (1968); Monypenny, *Toward a Standard for Student Academic Freedom*, 28 Law and Contemp. Probs. 625 (1963).

of no avail to the universities to argue that the students could meet off-campus.[70] There are good reasons why so little weight is given to such an argument: (1) the courts are also concerned with the rights of the other students (students not already participating) to have access to the meetings if they desire, and (2) often the purposes of a group include not only discussion among themselves, but also, as in this case, a desire to communicate their message to the skeptical and the uncommitted. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939). Nor is it permissible to argue that if students are interested enough to hear the message, they will gladly go off-campus to attend a meeting. The government may not abridge freedom of speech just because those desiring to hear the message could receive the message by some other means. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, n. 15 (1976), (striking down a statute banning the advertising by a pharmacist of the prices of prescription drugs); *Healy v. James, supra.* Thus, the fact that students interested in religious concepts can find churches off-campus is immaterial to their right to engage in their own meetings and discussion on campus.

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70. *E.g., Healy v. James, supra; Gay Students Organization v. Bonner*, 509 F. 2d 652 (1st Cir. 1974); *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969); *Keegan v. University of Delaware, supra.* In *Healy*, the Court noted that not being able to meet on campus was the most significant aspect of the policy. *Id.* at 176.

II.

THE REGULATION PLACES A DIRECT BURDEN ON THE STUDENTS' FREE EXERCISE OF THEIR RELIGION.

In the 1976 case involving the University of Delaware, the Supreme Court of Delaware held that the free exercise rights of the students desiring to attend a Catholic mass on campus were constitutionally burdened by a University policy which would not permit religious worship services in the common area of the dormitories. *Keegan v. University of Delaware,* 349 A. 2d 14, *cert. denied,* 424 U.S. 934 (1976). The court stated:

> The only activity proscribed by the regulation is worship regardless of whether one considers the proscription a direct or indirect burden on student activity. The commons area is already provided for student use and there is no request here that separate religious facilities be established. The area in question is a residence hall where students naturally assemble with their friends for many purposes, religion, at least in part, is historically a communal exercise. 349 A. 2d at 17.
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> * * *
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> We conclude that the regulation involved here has, in this factual context, both the purpose and the effect of impeding the observance of religion and thus constitutes a legal burden on the students' constitutional right to freely exercise their religion. 349 A. 2d at 19.

In this case, as has been noted, the religion of the Cornerstone students commands them to worship[71] and to study

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71. See scriptural references in footnotes 24 and 25 *supra.*

together.[72] Moreover, in this case there is at least one additional religious duty infringed by the regulation: the duty of evangelism. The duty of evangelism carries some special significance for our analysis in that, whereas the practice of their religion does not require that they worship God or study the teachings of the Bible *in any particular place*, the religious duty of evangelism is one which *must be* directly connected geographically with the campus.

For these students, evangelism on the campus is not an option, or a preference—it is an imperative, based upon Biblical commands.[73] It is not sufficient to argue that they can do their evangelism downtown, away from the campus. They have the right to gear their evangelism to the most likely prospects—their friends and peers—the ones who sit beside them in class. Therefore, the stated purpose of their group has always been "to promote a knowledge of Jesus Christ among students."[74] As one of the student leaders stated it:

> "Our purpose as a group is to promote a knowledge and awareness of Jesus Christ on the campus, and also, of course, to encourage one another in the faith

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72. See scriptural references in footnote 23 *supra*.

73. While it is true that Christians generally do not believe that a failure to be active in evangelism will cause the loss of their eternal salvation, it is almost universally regarded as a matter of obedience to the will of God, and to His scriptural commands. It is believed that obedience will result in the blessing of God, in one's own personal growth in relationship to Him, and in a great sense of fulfillment. Evangelical Christians uniformly believe that every person (except for children under "the age of accountability") must personally exercise faith in Jesus Christ as the sin-bearing Savior, and that, before that faith can be exercised, the individual must hear the message. "Evangelism . . . is the Church's primary task." Statement of Dr. John McKay, former president, Princeton Theological Seminary, quoted in A.S. Wood, *Evangelism —Its Theology and Practice* (Zondervan 1966) p. 10.

74. Exhibit B to Stipulation of Fact, A. 30.

> and to grow in the grace and knowledge of the Lord Jesus Christ. To carry out these objectives we must meet together, provide a forum for our message, and have a place for interested students to meet with us."[75]

Consequently, this case is somewhat different from *Keegan* in that we are not talking about simply the *convenience* of being able to attend religious activities on campus as opposed to having to go off-campus. No, we are also talking about a mission of *communication* to other students —a mission which requires visibility *on the campus*. One of the most popular forms of religious evangelism throughout the ages has been the invitation to attend a religious meeting.[76] In this case, any evangelism by means of a religious meeting is expressly prohibited, and, therefore, the exercise of evangelism is directly burdened.

Moreover, in this case the burden goes beyond the simple fact of not being able to meet on campus where interested prospects can be most likely attracted. If the religious meeting to which a student is invited is *not* on the campus, when *every other* student activity *is* on the campus, then there is a natural tendency to regard the religious meeting as something which is irrelevant to the realities of student life. When and if a visitor does make his way to the meeting off-campus, he encounters a meeting in the living and dining rooms of a small house, where students are jammed together and many cannot even see the speaker.[77] The point is that, because every other student activity is accommodated on the campus, the *comparison* resulting from the unjustified discrimination against religion puts religion at a relative disadvantage.

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75. A. 27.

76. *E.g., Martin v. City of Struthers*, 319 U.S. 141 (1943).

77. A. 18-19.

Accommodation of all groups preserves State neutrality, without endorsing a group's purpose as relevant; but excluding religious groups directly stigmatizes and burdens their activities.

As one of the Cornerstone students put it:

> "This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. *This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group*" (affidavit at A. 19) (emphasis added).

This Court has unmistakably declared its solicitous protection for the free exercise of religion where such exercise does not conflict with a governmental objective of overriding importance. *Sherbert v. Verner*, 374 U.S. 398 (1963) (unlawful to deny unemployment benefits to Sabbatarian unable to secure employment because of Sabbath observance); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish could not be forced to comply with compulsory education after eighth grade where it conflicted with the free exercise of their religious beliefs); *Thomas v. Review Board*, No. 79-952, 490 U.S.L.W. 4341 (U.S., Apr. 6, 1981) (Jehovah's Witness could not be denied unemployment benefits where unemployment resulted from religious convictions concerning construction of military tanks). This Court has declared that free exercise rights may be constitutionally burdened only as necessary to avoid "the gravest abuses, endangering paramount interests." *Sherbert, supra*, at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). As stated by the Court in *Yoder*,

> "[t]he essence of all that has been said and written on the subject is that only those *interests of the highest order* can overbalance legitimate claims to the free exercise of religion." (emphasis added). 406 U.S. at 215.

Also at issue is the right to associate for the advancement of beliefs. In this case, that right is both a free exercise right and a free speech right. *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958); *Kunz v. New York*, 340 U.S. 290, 293 (1951). And this right, in reality, is the one most directly attacked by the University in its regulation prohibiting "groups" from meeting for religious purposes.[78]

Here, the burden placed on the free exercise rights is a direct one. It is *at least* as direct as the burdens faced by the Amish in *Yoder* and by the Sabbatarians in *Sherbert*, and by the Jehovah's Witness in *Thomas*. Hardly anything is more fundamental and basic to an evangelical Christian than the rights being suppressed here, as we have already noted. And in order to exercise those rights, the students would have had to subject themselves to the possibility of punishment.[79] Even worse than the possibility of punishment, however, was the risk of further damage to the credibility of their message that would likely have resulted from any confrontation with the administration. It is difficult for a non-religious, non-evangelistic person to understand why a religious person would insist on having the right to meet on campus. Therefore, the religious person who violates the University's rules and is dismissed or prosecuted as a troublemaker is viewed by the news media and in informal discussions as a misguided neurotic who enjoys persecution. Consequently, religious students desiring to speak a credible message and to live a credible

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78. It is not clear what a "group" is for purposes of the regulation. There is nothing to indicate that it has to be any particular size, so presumably two people discussing religion in the lounge of the University Center could be a "group," in the discretion of the University administrator. This would leave him with discretion like that struck down in *Niemotko v. Maryland*, 340 U.S. 268 (1951), and *Cox v. Louisiana*, 379 U.S. 536 (1965).

79. See footnote 74.

lifestyle find themselves in a cruel dilemma: keep the meetings off campus with all the attendant disadvantages, or violate university restrictions and end up in a confrontation that could further impair the credibility and respectability of the group, and therefore, of the message.

The District Court found that the interests protected by the Establishment Clause outweighed the freedoms burdened by the regulation. The Court of Appeals readjusted the scales by a different view of the liberties protected and a different understanding of the aims and scope of the Establishment Clause. Thus, the Eighth Circuit rightly found no conflict between the Establishment Clause and the Free Exercise Clause in this case.[80] That finding was correct, as discussed in more detail in Section III. But even if a conflict were found, it is clear that the free exercise claims would take precedence, since the underlying purpose of the Establishment Clause was to protect freedom of religion (not freedom *from* religion). *Sherbert, supra,* at 409-10; *Yoder, supra,* at 234, n. 22; Tribe, *American Constitutional Law,* pp. 819-823 (1978).

III.

THERE IS NO COMPELLING GOVERNMENTAL INTEREST WHICH JUSTIFIES A REFUSAL TO ACCOMMODATE THE SPEECH, ASSOCIATION, AND RELIGIOUS EXERCISE RIGHTS OF THE STUDENTS.

Having established that the regulation burdens the First Amendment rights of speech, assembly and free exercise

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80. In fact, the Eighth Circuit found that because of the regulation's unjustified hostility to religion, the Establishment Clause weight did not belong on the governmental side of the scale at all, but instead belonged on the same side as all of the freedoms in question. In short, the Eighth Circuit found no justification at all for the regulation.

of religion, we turn now to the most critical question of the case: whether these restrictions can be justified by the Establishment Clause or by the Missouri Constitution. If such restrictions are required by the Establishment Clause as the District Court concluded, then every public university in this country must prohibit religious activities on campus.[81] If such restrictions are not required by the Establishment Clause, but are required by the Missouri Constitution, then universities in states with similar constitutional provisions will be required to adopt and enforce such policies, if they do not already have them. Moreover, states such as Missouri may have to rethink their policies with regard to religious activities at public parks and state hospitals, since there are no clear boundary lines to the arguments used to justify the regulation in this case.

However, the University has not shown that either the Missouri or the Federal Constitution requires such a provision, nor can such a showing be made.

A. A Policy of Accommodating Voluntary Religious Speech and Activity in a Public Forum Does Not Violate the Establishment Clause.

This Court has stated that the Establishment Clause provides no rigid, mechanical formula by which to evaluate all forms of government involvement with religion. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1969).

The objective of the Establishment Clause, as the Court has frequently noted, was to *protect freedom of religion*. *Engel v. Vitale*, 370 U.S. 421 (1962) at 432; *McDaniel v. Paty*, 435 U.S. 618 (1978) at 642 (Brennan and Marshall, JJ., concurring).

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81. A substantial percentage of public universities permit religious activities on campus on an equal basis with other activities. See footnote 45.

Thus, while the Court has utilized the tripartite test as a convenient tool of analysis in many cases, and while the Court has also at times examined legislation in the light of the principles of voluntarism and neutrality underlying the Religion Clauses, nevertheless the Court has never intended to abandon common sense and the illustrations of history as guides in the matter. *Meek v. Pittenger*, 421 U.S. 349 (1975).

In this case, regardless of the method of analysis, all of the criteria employed by the Court in the past indicate that a neutral policy of permitting all kinds of expression and activities on campus would in no way violate the Establishment Clause.[82]

The University chooses the frequently-employed tripartite test as the basis for its analysis, relying upon the "primary effect" test, concluding that the test mandates the restrictions here imposed because a neutral policy which *fails to discriminate* against religion will cause an aura of implied approval by the state, and because such a policy would constitute financial assistance to the religious purposes of the group.

The University's argument as to primary effect overlooks a simple common sense question: how can a policy of accommodating *all* viewpoints be said to have a primary effect of advancing *one particular* viewpoint? Nowhere does the University come to grips with this issue, nor does the University even acknowledge that such a question might have relevance to this inquiry. This bypassing of basic reasoning is troubling enough in itself to cast serious doubt on the validity of the University's contentions. But

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82. See the excellent discussion in Toms and Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 Emory L.J. 3 (1978).

any vestige of credibility which remains is destroyed by closer examination of the arguments in the light of sound reasoning and actual precedent.

1. The "aura of approval" does not exist—but if it does, the aura can be removed without abridging fundamental rights.

The University's contention that allowing religious activities on campus would cause an appearance of sponsorship is questionable. As the D. C. Circuit stated in *O'Hair v. Andrus* with regard to a similar contention:

> "When the National Mall is, as a matter of established policy, openly available on a non-discriminatory basis to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair and to *all* others (religionists and anti-religionists) there is no Establishment of a religion" and *there cannot be a meaningful perception of one.* 613 F. 2d at 934 (emphasis added).

In our case, the facilities on campus are available for a film about "Sri Chimnoy, Indian Spiritual Master",[83] and are also available for Transcendental Meditation,[84] and for Betty Friedan to speak on "The Future Dream of Human-

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83. See footnote 10, *supra.*

84. *The University News,* Vol. 15, #18 (February 9, 1978), announced the scheduling of events for the Transcendental Meditation program. The lectures, films, and sessions were sponsored by the Students International Meditation Society on UMKC. The sessions were held in the University Center, according to the article. *The University News,* Vol. 17, #4 (September, 1979), also carried an advertisement inviting students to a "free introductory program about Guru Maharadji and the Knowledge he reveals," again held on campus in the University Center. A picture of the guru carries a caption, "I'll give you that incredible Knowledge that you have been looking for all your life." Transcendental Meditation was held to be religious in *Malnak v. Yogi,* 440 F. Supp. 1284 (D. N.J. 1977) *aff'd per curiam,* 592 F. 2d 197 (3d Cir. 1979).

ism".[85] They are also, of course, available to Madalyn Murray O'Hair, to an atheist club, a Communist club, and any other ideological group which denies the existence of God. Consequently, it seems unlikely that any student of sound reasoning would conclude that the University has any purpose in mind other than the accommodation of many viewpoints and opportunities.

But even if there were an aura of approval toward religion, the University, in avoiding that aura, would have a duty to use measures designed to have the least restrictive impact on the freedoms in question. If the harm feared could be averted by further communication, governmental suppression will be found unconstitutional. *Linmark Associates, Inc. v. Township of Willingboro*, 97 S. Ct. 1614 (1977) (town could not prohibit the posting of real estate "for sale" signs to avoid panic selling where it could use counter-publicity in effort to forestall "white flight."). Here, signs can be posted, announcements can be made in the University catalogs and student handbooks, and there are probably many other ways to avoid an appearance of approval.[86] *Allen v. Morton*, 495 F. 2d 65, 67, 90-91 (D.C. Cir. 1973).

2. There is no impermissible financial assistance to religion provided by a neutral policy allowing access of all viewpoints to a public forum.

The University also argues that the "primary effect" test would be violated by allowing religious meetings on

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85. *The Kansas City Star*, April 5, 1981, carried an article indicating that Ms. Friedan, well-known humanist author and lecturer, was to deliver a public message of the stated title in the University Center on April 15, 1981.

86. As noted, footnote 44, the University has already published the fact that it does not endorse or sponsor the viewpoint or activities of any special interest group.

campus because expenditures for maintenance, heating, and lighting, accrue to the benefit of any religious group which uses the facilities. To put this argument in perspective, let us consider the fact that the record makes clear that these buildings are going to be there, open, available, heated, lighted, and maintained, regardless of whether students are permitted to meet for religious purposes. The students in this case do not ask the University to construct for them a building, or even to set aside a room, for their exclusive use. Therefore, it is obvious that, whether we are talking about the lawn or the buildings, we are talking about a situation which is analogous to the use of a public park. It is true that the use of a public park or public university property for religious activity does provide a benefit which accrues to the religious activity. But no case has ever held that failure to prohibit religious activities in a public park amounts to a violation of the Establishment Clause. Indeed, many cases have not even recognized that there was such an issue. *Niemotko v. Maryland*, 340 U.S. 268 (1951) ("Bible talks" in public park); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (minister holding meeting in public park.) Other cases have specifically held the Establishment Clause inapplicable. *E.g., O'Hair v. Andrus, supra.* And in three other cases the courts refused to block religious meetings on the campuses of public universities. *Keegan v. University of Delaware, supra* (common area of dormitory); *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 520 P. 2d 514 (En Banc 1974) (football stadium); *Stacy v. Williams, supra* (university facilities generally).

Tilton v. Richardson, 403 U.S. 672 (1971), has no application because what was found offensive in that case was the unconditional grant of 20-year-old buildings of substantial value to the exclusive use and ownership of sec-

tarian institutions. It was not a case involving "equal accommodation" in a public forum. It was very much like a "money grant" case—the type of case which must be scrutinized very closely to avoid establishment problems. Moreover, in *Tilton*, there were no free speech or free exercise interests to offset against the Establishment Clause interests. The case was analyzed strictly on the basis of the Establishment Clause.

The recent case of *Gilfillan v. Philadelphia*, 637 F. 2d 924 (3d Cir. 1980) provides a helpful illustration for our analysis. In that case, the Catholic Diocese had arranged for the Pope to conduct a religious service at the city's Logan Circle. In addition, the city had agreed to construct a large platform for the exclusive purpose of this religious service. The plaintiffs in that case did not even challenge the fact that city property was made available for this service, but they did challenge the city's involvement in constructing this platform *solely for this service* at taxpayer expense. In that case, it was rightly held that tax revenues could not be used for the construction of the platform. In this case, the Cornerstone students are not seeking any special accommodation, or favoritism. They do not want any special facilities constructed at taxpayer expense for their exclusive use. All they ask is the same opportunity to use the existing facilities that all of the other special interest groups have.

If allowing religion in university facilities constitutes "financial aid" to religion, then the accommodation of the Young Socialists and the Gay Liberation meetings must constitute "financial aid" to their purposes. Under the Due Process Clause, however, the government may not employ tax revenues for other than a "public purpose."

Citizens Savings and Loan v. Topeka, 20 Wall. 655, 664, 22 L. Ed. 455, 461 (U.S. 1975).[87]

Would the University choose to argue that the Due Process Clause forbids any student activities on University property, because the University would thereby be "financially aiding" the viewpoint of some groups which might have a purpose contrary to firmly established public policy? Or would the University contend that the student activities programs should be censored so that viewpoints conflicting with public policy could be excluded? That issue has already been decided. *Healy v. James, supra.* No, the correct analysis would recognize that a forum for the expression of viewpoints and exchange of ideas has legitimate value in itself, regardless of the viewpoints expressed in that forum. Therefore, there is no financial aid to any purpose except the purpose of promoting intercommunication and the accommodation of the needs and interests of the students.

In actuality, the only benefit accorded to religion would be, at most, incidental—like the aid to religion resulting from the broadcasted comments of the Apollo astronauts challenged in *O'Hair v. Paine, supra.* Therefore, a policy of neutral accommodation of all viewpoints would certainly be even less offensive to the Establishment Clause than the benefit afforded religious groups by the property tax exemptions upheld in *Walz v. Tax Commission*, 397 U.S. 664 (1969). In that case, the Court looked first at the legislative purpose of such exemptions, and noted that there was no legislative intent to establish

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87. This doctrine was employed in *Everson v. Board of Education*, 330 U.S. 1 (1947), by the plaintiffs in their challenge to the use of tax revenues for reimbursement of the cost of bus transportation for children attending school. While finding the doctrine not applicable in that case (because helping children get to school was a valid public purpose) the Court nevertheless acknowledged the validity of the doctrine.

religion. The Court next noted that the tax exemption created only a minimal and remote involvement between church and state, and that taxation of churches would be more likely to entail excessive entanglement with religion.[88] And, finally, the court noted that freedom from taxation has not tended to lead to an established church or religion and that, on the contrary, it has helped to guarantee the free exercise of all forms of religious belief, which is the real purpose behind the Establishment Clause.

In view of all of the foregoing, it is clear that the Eighth Circuit was correct in finding that the Establishment Clause did not require any restriction on access to campus facilities for student religious meetings. Since the expression of religious values is non-governmental expression, since there is no prohibited financial aid involved and since the only "aid" involved is no greater than the aid to anything else, a neutral policy would not in any sense be a policy "respecting an establishment of religion."

B. Missouri Has No Compelling Interest in Keeping Student Groups From Engaging in Voluntary Religious Speech and Exercise on the University Campus.

Student-Respondents readily acknowledge that Missouri, like other states, has an interest in keeping church and state separate. Student-Respondents are also aware of the fact that several cases indicate that Missouri has a stricter standard with regard to separation of church and state than does the Federal government. What is not at all clear, however, is that the State of Missouri

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88. The entanglement aspects of a policy other than equal accommodation of religious activities are briefly discussed in footnote 96 below.

has any interest at all in prohibiting voluntary student religious activities in the cosmopolitan atmosphere of the state university. The University sets out the detailed provisions of certain constitutional provisions, but fails to indicate how any of those constitutional provisions apply to the facts of this case. Certainly, on their face, not a single one directly applies to the case before us. The one appearing to come the closest is Article I, Section 6, which provides that no one is to be compelled to erect, support, or attend any place or system of worship, or any teacher or clergy thereof. Does the University mean that if a neutral policy of accommodating all groups were in effect, that the University center, and the lawn, would thereby be transformed into a "place or system of worship"? If so, then the University is contending that no religious activities could be permitted to take place on tax supported property, and a constitutional problem is thereby created. What about religious services in state parks, state hospitals, and state penal institutions? What about one-on-one evangelism activities on the grounds of the University, or in a state park? What about someone reading a Bible by himself on state property? Does the University need to go even further and adopt restrictions on private prayer and Bible study? Obviously, applying these provisions to ban all such religious activities on tax supported property would clearly violate free speech and free exercise interests. Therefore, in order to save the Missouri constitutional provisions from invalidation, we must find either that the provisions do not apply as the University has suggested, or that the provisions are not absolute, but are only relative in effect, and must give way to free speech and free exercise interests where those interests are burdened.

Consequently, it seems evident that what the University is defending here is, at best, its own interpretation

of the requirements of the Missouri Constitution.[89] And, in doing so, the University is completely overlooking *other* compelling interests of the State of Missouri. Some of these other interests being overlooked are interests in preserving neutrality and voluntarism in matters of religion, free speech, academic freedom, and the interest in securing for university students the best possible education by allowing exposure to a true plurality of viewpoints, religious and secular, at the state institution.

For many years, universities have permitted religious activities on their grounds. Has it caused any unfavorable or undesirable conditions at those universities? Has it resulted in an establishment of religion at those universities? Or has it simply, as the tax exemptions in *Walz*, served to further guarantee the free exercise of religion and to insure that each religion, whether a minority or a majority view, is entitled to participation in the "marketplace of ideas"?

The true attitude of the State of Missouri is much more in line with the federal approach to establishment issues than the University acknowledges. In 1976, the Missouri Supreme Court, in *Americans United v. Rogers*, 538 S.W. 2d 711, *cert. denied*, 429 U.S. 1029 (1976), upheld a tuition grant program for students attending private colleges and universities, including sectarian colleges. In that case, the Missouri Supreme Court expressly followed the recent United States Supreme Court decision in *Roemer v. Board*

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89. The University's handling of Communiversity (see footnote 10 *supra*) is somewhat puzzling. We have no trouble seeing that Communiversity, which is apparently designed primarily as a service to non-student residents of the general community, is actually a public forum, and the University most probably would agree. We do have trouble understanding, however, how the University can see sponsorship problems with regard to the simple allocation of space to special interest groups on campus, but not with regard to this use of the student activity funds.

of Public Works of Maryland, 426 U.S. 736 (1976), and stated:

> "In doing so [upholding this legislation] we take solace in the fact that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: "institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background in faculty and students." 538 S.W.2d at 722.

We also cannot fail to note that there has been no expression of support for the University's regulation issuing forth from the legislature of Missouri,[90] no *amicus* brief filed by the Attorney General, or any other indication of support for the University's rigid interpretation from any other state official purporting to represent the interests of Missourians or Missouri government in general.

Far from opposing voluntary religious activities on the University Campus, the State of Missouri quite probably looks on in wonderment at the tenacity of the University in attempting to defend its regulation which the curators doggedly state "is not open to any other construction."[91]

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90. The Missouri legislature, in fact, appears to be far less impressed by the strictness of the Missouri constitutional provisions than the University is. The State Senate pays $500 per month to a clergyman to offer invocational and benedictional prayers. The House of Representatives has, until recently (following the invalidation of a similar practice in Nebraska) paid each of two clergymen $349 per month for the purpose of offering such prayers. *Church and State*, Vol. 34, No. 5, May 1981, article, p. 20 (116). These policies would seem to be much more in conflict with Article I, Section 6 of the state constitution than simply allowing religious groups equal access to public property.

91. Regulation at A. 29.

C. Even If Missouri Had an Interest in Keeping Religious Speech and Activities Off of University Property, Such Interest Would Be Overridden by the Free Speech and Free Exercise Interests of the Students, Protected by the First and Fourteenth Amendments of the United States Constitution.

As we have noted, it is the duty of government to protect, not to suppress, freedom of religion and freedom of communication. But even if Missouri did have an interest in restricting voluntary religious speech and activities on the public university campus, it is fundamental that the Fourteenth Amendment Due Process Clause would require invalidation of the regulation in this instance. The purpose of the Fourteenth Amendment was to protect the rights of the individual from state policies and laws which infringe fundamental rights, and this Court is not about to allow the State of Missouri to legislate away fundamental freedoms.[92]

IV.

ANY APPROACH OTHER THAN ALLOWING EQUAL ACCOMMODATION FOR STUDENT RELIGIOUS MEETINGS WOULD VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE IT WOULD CONSTITUTE UNJUSTIFIABLE HOSTILITY TO RELIGION.

This Court has long recognized that the Establishment Clause calls for government neutrality in matters of religion, and that government hostility to religion, as well as government sponsorship of religion, can violate the Estab-

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92. The American Jewish Congress candidly acknowledges in its brief *amicus curiae* that, because of conflict with general First Amendment principles, the provisions of the Missouri constitution cannot justify the regulation. p. 16, footnote 3, brief *amicus curiae*.

lishment Clause.[93] Justice Harlan, discussing the goal of proper and acceptable relationships between government and religion, stated in his concurring opinion in *Walz v. Tax Commission*:

> "Two requirements freely articulated and applied in our cases for achieving this goal are 'neutrality' and 'voluntarism.' *E.g.*, see *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Concurring opinion of Mr. Justice Goldberg); *Engel v. Vitale*, 370 U.S. 421 (1962). These related and mutually reinforcing concepts are short-form for saying that the Government must neither legislate to accord benefits that favor religion over non-religion, nor sponsor a particular sect, nor to encourage participation in or abnegation of religion. Mr. Justice Goldberg's concurring opinion in *Abington*, which I joined, set forth these principles: 'the fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that *it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief*'." 374 U.S. at 305. (emphasis added).

As we have seen, refusing to discriminate against religious activities from a public forum certainly does not violate the concepts underlying the Religion Clauses. However, it is equally clear that the University regulation does violate these concepts, since the heavy-handed exclusion of private religious speech from a public forum is one of the evils the Religion Clauses were designed to eliminate.

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93. *Abington School District v. Schempp*, 374 U.S. 203 (1963) at 299 (Brennan, J., concurring); *Epperson v. Arkansas*, 393 U.S. 97 (1968) at 103-104; *Everson v. Board of Education*, 330 U.S. 1 (1947).

The voluntarism requirement, as described by Justice Harlan, is achieved when legislation "neither encourages *nor discourages* participation in religious life." (emphasis added). The principle of voluntarism, in other words, is that people should be free, without governmental inducement or interference, to worship *as* they choose and *if* they choose, and to practice their religion or non-religion as they see fit. Here, the students are not able to exercise that voluntary choice on campus, even though the campus might be their home.[94]

Neutrality, according to Justice Harlan's view, "requires an equal protection mode of analysis." Here, there is no equal treatment. This is, in effect, goverment propagandizing in subtle form—a forum which simply, "under color of law," excludes one group or class of ideas from participation in a vast pluralism. The "freedom of anti-religion" on the campus is absolute, but freedom of religion must fight for its very life!

Another problem, more subtle, is the practical problem of neutrality as *among* religions. Our society today contains many religious and quasi-religious movements which are not immediately identified as religious by university administrators because these movements do not have the labels we traditionally associate with religion. Examples of such movements are eastern mysticism, transcendental meditation, yoga, witchcraft, humanism, and secularism.[95] An administrator is likely to screen out and prohibit a Roman Catholic mass while permitting a meeting where transcendental meditation or eastern mysticism

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94. Van Alstyne, *The Student As University Resident*, 45 Denver L.J. 582 (1968).

95. *Torcaso v. Watkins*, 367 U.S. 488 (1961), footnote 11, at 495; *O'Hair v. Andrus*, 613 F. 2d 931 (D.C. Cir. 1979), footnote 19, at 935. TM has been held to be a religion. *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979). See also *United States v. Seeger*, 380 U.S. 163, 176 (1965).

is taught. With new and different religions and movements appearing regularly in American culture today, a formidable task of censorship is forced upon the University administrator, entangling the university administrator in extremely difficult religious definition and distinction,[96] making it impossible for the university to be truly neutral in practice.[97]

Equal accommodation is the key. The reason that the courts in *Pratt v. Arizona Board of Regents,* 110 Ariz. 466, 520 P. 2d 514 (1974) and *O'Hair v. Andrus,* 613 F. 2d 931 (D.C. Cir. 1979) (McKinnon, concurring) expressed concern about the possible establishment effect of regular religious meetings is because the facilities in question there (the National Mall and Sun Devil Stadium) were not multi-room facilities but rather were forums capable of use by only one large group at a time. Therefore, the jurists were alerted to the danger that a religious group could pre-empt the space from other groups by a long term lease which would exhibit favoritism toward religion, and not neutrality.

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96. The administrator must be able to differentiate between "religious teaching" and "teaching about religion." He also must be able to determine if there is "an atmosphere of worship" at the meeting. The problems of definition and censorship will be even greater in a policy such as that approved in *Dittman v. Western Washington University,* ..... F. Supp. ....., Cause No. 79-1189V (W.D. Wa. 1980) (appeal docketed, 9th Cir., No. 70-3120, Apr. 7, 1980), where the University did not completely prohibit religious activities, but discriminated against those activities by requiring a "fair rental" and limiting the religious meetings to twice per quarter. The *Dittman* formula obviously leads to a quagmire of unresolved questions.

97. The University assumes every religious group will frankly state whether or not their meaning is religious. Just because the Cornerstone students place a high value on integrity does not mean that every other group would be so honest. If the university did not engage in surveillance, only the honest students would be penalized.

The University is capable of devising methods for allocating space that will ensure no pre-emption or favoritism, and presumably has already done so.

CONCLUSION

Thomas Jefferson, an educator as well as a statesman, wrote on October 7, 1822, concerning a plan to allow sectarian religious instruction on the grounds of the University of Virginia:

> Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles that would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy. . . . 19 *The Writings of Thomas Jefferson* (Memorial edition 1904), pp. 415-417.

Our universities today have become so dedicated to the concept of nonestablishment that we have betrayed the underlying purpose of the Religion Clauses, and have abandoned the "most inalienable and sacred of all human rights" by refusing to accord to religious speech and exercise the same degree of protection we accord to other kinds of expression on the campus. The universities today are teaching young adults that traditional religion and the values contained therein are less than essential—indeed, quite expendable. One concerned educator has stated:

> "The biggest failing in higher education today is that we fall short on exposing students to values. . . . This situation has come about because the modern uni-

> versity . . . [has] essentially turned its back on religion. . . ." (comments of Dr. Steven Muller, President, Johns Hopkins University, reported in *U.S. News and World Report* (Nov. 10, 1980), pp. 57-58.

Frankly, we do not want the University to go so far as to sponsor any religions, or to favor any particular religion, or even to promote religion in general as against anti-religion. However, we do expect *equal accommodation of voluntary student religious activities.* It is one thing to exclude the religious viewpoint from the classroom. It is quite another to kick it off the campus altogether!

Because of the essential value of the fundamental freedoms at stake in this case, and because the Establishment Clause was designed to protect, not to suppress, individual religious freedom, Student-Respondents urge this Court to affirm the well-reasoned decision of the Court of Appeals.

Respectfully submitted,

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No. 80-689

IN THE

Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, *et al.*,

Petitioners,

vs.

CLARK VINCENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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MOTION OF THE
AMERICAN JEWISH CONGRESS
FOR LEAVE TO FILE A
BRIEF AMICUS CURIAE

The undersigned, as counsel for the American Jewish Congress, respectfully move this Court for leave to file the accompanying brief amicus curiae in support of petitioners. Pursuant to S. Ct. Rules 36 and 42, the parties' consent was sought. Counsel for respondents consented to the filing of this brief, but counsel for petitioners declined to do so.

The American Jewish Congress is a national organization of American Jews founded in 1918. Among its major concerns are the preservation and protection of the separation of church and state secured by the Establishment Clause of the First Amendment to the Constitution of the United States. We seek permission to file

this brief because we believe that the decision of the United States Court of Appeals for the Eighth Circuit fundamentally undermines the values inherent in, and the protection afforded by, that clause.

The American Jewish Congress has participated in a large number of church-state cases before this and other courts. It believes that its accumulated experience in this field and its deep commitment to the First Amendment permit it to make a unique contribution to the discussion of the Constitutional issues involved in this case.

Respectfully submitted,

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Question Presented

Does the Establishment Clause of the First Amendment to the United States Constitution prohibit state officials from making governmental facilities, paid for with tax funds, available for religious services?

Statement of the Case

This case was brought by several students, members of a religious group called Cornerstone, (henceforth collectively referred to as Cornerstone) at the University of Missouri-Kansas City to challenge a university rule which prohibits the use of university facilities for purposes of religious worship or study. The case was decided by the District Court on stipulated facts which are summarized in the opinion of the District Court, Appendix at 26.

In brief, the stipulation established that Cornerstone was a religious organization interested in running on-campus prayer and study sessions. It sought permission from school officials to use, without charge, available space for these

purposes on the same basis as such space was made available to other student run activities. The meetings were to be open to the public. It was an essential purpose of these meetings to attract the "uninvolved" so that they might make "a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth."

Acting pursuant to University rule 4.0314.0107 (henceforth "the Rule") school officials denied Cornerstone's request. This suit followed. The complaint alleged that the Rule interfered with respondents' constitutional rights, principally the right of Cornerstone to the free exercise of religion.

Cornerstone introduced the testimony

of two of its members as to the allegedly deleterious effects of the Rule. The thrust of that evidence appears in the testimony of one Florian Chess who stated:

> 8. The program for our Saturday night meetings on campus consisted of Bible study and teaching, prayer, informal sharing, and singing. All are welcome to attend, and, in fact, it is our purpose to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ and the Bible.
>
> 9. We have never had nor sought any official promotion or sanction as to our activities or purposes from the university administration, and we expect no more accommodation than that which is afforded other recognized student groups.
>
> 10. The prohibition against meeting on campus which began in February, 1977, has had a very significant impact on our meetings, on our attendance, and on our ability to maintain the momentum of our outreach to students and faculty.

11. We have continued to meet, of course, but being off campus has had many unfortunate disadvantages:

a) One disadvantage is a loss of visibility and identity as a campus organization. In a real sense, we are no longer a "campus" organization, and it is difficult to interest other students in any activities which are off campus. Students know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting.

b) Another disadvantage is increased confusion. Even though we have begun meeting in a house located only about a block and a half from the campus, students who are not familiar with where we are meeting are not as likely to go to an unfamiliar address on a residential street (Charlotte Street) as they would be to go to a regularly used and well-known campus building.

c) Another disadvantage is decreased comfort. Interested visitors are not encouraged to return by the crowded and uncomfortable conditions that exist at the meetings on Charlotte Street. Not only is the house severely overcrowded, but the house is so constructed that probably no more than about forty percent of those in attendance can see the person speaking even when the speaker stands in the most observable position.

d) Another disadvantage is lack of convenience and efficiency. It is just not as convenient for students to go off campus as it takes more time out of their schedules.

e) Another disadvantage is the burden that it places upon those who host the meetings. We have been having roughly seventy-five people at our regular off-campus meetings.

f) Another disadvantage is that it makes our message and our purposes seem more remote and less relevant to

the typical student. Having to explain that we have to meet off campus tends to make students think that there is something "wrong" with us and that there is something wrong with religion since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group.

g) In addition, and also as a result of the above stated factors, we have experienced a definite decrease in the attendance at our activities. We have continued to promote our activities and have continued our efforts to attract other students, but our attendance has been lower since we were forced off campus. We seem to have an average attendance of roughly seventy-five or so at our recent meetings since being forced off campus, and it would be physically impossible for

> us to accommodate many more than now attend. It would be impossible, for instance, to accommodate the one hundred and twenty-five we used to have at some of our campus meetings on previous occasions when we were permitted to meet on campus.

The District Court found all of Cornerstone's arguments unpersuasive and entered judgment for the University. The Court of Appeals reversed, and later denied rehearing en banc, two judges dissenting.

Argument

I. This Case Must Be Decided Solely With Reference to the Establishment Clause

The religion clauses of the First Amendment protecting religious freedom and barring religious establishment, although different in form, both serve to guarantee

religious liberty. This Court, in PEARL v. Nyquist, 413 U.S. 756, 788 (1973); Wisconsin v. Yoder, 405 U.S. 205, 220-21 (1972); and Walz v. Tax Commission, 397 U.S. 664, 669 (1970), has suggested the possibility of situations in which the commands of the two clauses collide. However, this case does not present such a situation.[1/] Instead, it presents for decision the validity of a rule which does nothing more than enforce the Establishment Clause's prohibition on government support for religion. Although that prohibition necessarily inhibits religion, it does not clash, in the legal sense, with the Free Exercise Clause with which

1. This is not a case even remotely similar to those where the government has isolated persons from all access to religious facilities, and may thus constitutionally supply them with a chapel and chaplains. Rudd v. Ray, 248 N.W. 2d 125 (Iowa 1976).

it is linked. Neither does the Rule at issue here.

Respondents may well be more effective in carrying out their religious mission if the Rule is declared unconstitutional. Nor do we doubt that, ordinarily, any governmental policy which interferes with religious activities or which makes effective implementation of religious beliefs more difficult must, under the Free Exercise Clause, serve some compelling governmental interest. Wisconsin v. Yoder, supra; Sherbert v. Verner, 374 U.S. 398 (1963); cf. Healy v. James, 408 U.S. 169 (1972). We submit, however, that that burden need not be borne where, as here, the governmental policy is compelled by the Establishment Clause.

This is hardly novel doctrine. This

Court has repeatedly rebuffed claims that the denial of governmental assistance to parochial schools violates Free Exercise rights. See, e.g., PEARL v. Nyquist, supra, 413 U.S. at 788-89. More to the point, it has likewise given short shrift to the argument that prohibiting school-sanctioned religious ceremonies manifests hostility toward religion. School District of Abington Twshp. v. Schempp, 374 U.S. 203, 225-26 (1963); Engel v. Vitale, 370 U.S. 421, 433-35 (1962). The reason, of course, is that such acts run squarely afoul of the Establishment Clause. As we demonstrate below, Point III, so would granting respondents' request for permission to conduct its religious activities on petitioners' campus.

It is understandable that groups,

like respondents, that face the possibility of limitations under the Establishment Clause should view it as a restriction on their religious beliefs and practices. No doubt it frequently is. But those restrictions are the price of the bargain struck to preserve religious liberty in a society composed of literally hundreds of different religious faiths. McCollum v. Bd. of Educ., 333 U.S. 203, 215-16, n.4 (1948) (Frankfurter, J., concurring).[2/]

The Court below thus erred in equating, for constitutional purposes, governmental aid to religious activity with ordinary free speech principles.

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2. The 1980 Yearbook of American and Canadian Churches lists 222 major religious groups (p. iv) and cites the existence of "thousands of cults and sects" (p. iii).

For constitutional purposes, religious activity is different from non-religious activity, as the very existence of the religion clauses testifies. Religious institutions, for example, are the beneficiaries of special protections not afforded other institutions, and are insulated from much governmental regulation. For example, those who profess religious objections to military service are exempted, but those who hold merely "philosophical" objections are not. Wisconsin v. Yoder, supra, 406 U.S. at 215; Gillette v. U.S., 401 U.S. 437 (1971).

But the First Amendment is not a one-way street. As Judge Adams put it succintly in his concurrence in Malnak v. Yogi, 592 F.2d 197, 213 (3d Cir. 1979), "The rose cannot be had without the thorn."

The constitutional purpose of insulating religion from government and government from religion also forbids government to accord certain types of benefits to religious institutions that it may grant others. Thus, while government may not provide direct or indirect financial aid to parochial schools in any amount, see, e.g., Meek v. Pittenger, 421 U.S. 349 (1975); PEARL v. Nyquist, supra; Lemon v. Kurtzman, 403 U.S. 602 (1971), it may aid nonsectarian schools. It may not provide free space in public buildings for religious groups having no other relationship to the premises, see, e.g., Resnick v. East Brunswick Twshp. Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978), although it may constitutionally do so for non-sectarian groups such as the Boy Scouts,

Resnick v. East Brunswick Twshp. Bd. of Educ., supra.

For much the same reasons the equal protection claims made by respondents are not relevant to the disposition of this case. Making governmental facilities available for religious services and making them available for non-religious speech are "different" and therefore need not be treated "as though they were the same." See Michael M. v. Superior Ct., U.S. , 49 U.S.L.W. 4273, 4274 (1981).

Also to be distinguished are the cases which hold that, in granting access to public buildings, public officials may not favor one speaker over others on the basis of the content of their speech. See, e.g., ACLU v. Bd. of Educ., 55

Cal.2d 167, 10 Cal. Rptr. 647, 359 P.2d 45, cert. denied, 368 U.S. 819 (1961). Those cases have no relevance here, since the distinction to be drawn between sectarian and non-sectarian speech is required by the First Amendment. Likewise to be distinguished are cases such as Niemotko v. Maryland, 340 U.S. 268 (1951), in which the issue was whether the government could exclude disfavored religions from conducting services in public forums, not whether any such services were permissible.

II. The Challenged Rule Does Not "Establish" Hostility to Religion

Respondents' constitutional claim is premised largely on the litany of complaints contained in the stipulated testi-

mony of Florian Chess.[3/] Those complaints are nothing more than a claim that Cornerstone could carry out its work more effectively if it were granted official status by the University, and that its exclusion from on-campus facilities stigmatizes it. This was alleged to be so both because it was physically more convenient for students to meet on campus, and more importantly, because,

> [The Rule] makes our message and our purposes seem more remote and less relevant to the typical student. Having to explain that we have to meet off campus tends to make students think that

3. Because we agree that, if the Rule is not required by the federal Establishment Clause, it would be unconstitutional under general First Amendment principles -- whether free speech, Healy v. James, supra, free exercise, Wisconsin v. Yoder, supra, or both -- we think that the provisions of the Missouri constitution cannot provide a justification for the Rule.

> there is something wrong with religion since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. This kind of thinking is a large barrier to the effectiveness of our message and the purposes of our group. [App. 31-35.]

The Court of Appeals found this last criticism of the rule particularly persuasive. Citing this portion of the record, it concluded that "The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups." App. 14. As a result, that Court concluded, the Rule violated the Establishment and Free Exercise Clauses. As already noted, we submit that the Free Exercise Clause has no role to play in this litigation, once it is determined that the Rule implements the

Establishment Clause. We turn therefore to the Establishment Clause, considering first the holding of the Court below that the Rule itself manifested hostility toward religion.

The Court below correctly held that this case is governed by the so-called tripartite test. See, e.g., Stone v. Graham, 101 S.Ct. 190, 193 (1980). For present purposes, it suffices to focus on the two elements of that test discussed by the Court below -- effect and excessive entanglement.

A. Excessive Entanglement

The Court below concluded that the Rule

> hopelessly entangles [the University] in the delicate tasks of defining religion, determining whether a proposed event involves religious worship or teaching,

> and then monitoring events to insure that no prohibited activity takes place. These would be particularly difficult tasks in our contemporary society. [App. 14.]

This reasoning would lead to the invalidation of the First Amendment itself. This Court has held that only religious activities, as distinguished from philosophic beliefs, are entitled to the protection of the religion clauses of the First Amendment. Wisconsin v. Yoder, supra, 406 U.S. at 215. The inquiry into whether a particular practice is religious, while most delicate, has been undertaken by this Court on several occasions, notably in the conscientious objector cases. E.g., Gillette v. U. S., supra; U. S. v. Seeger, 380 U.S. 163 (1965). See also Lemon v. Kurtzman, supra, 403 U.S. at 614,

citing Walz. v. Tax Commission, supra.

Moreover, only religious practices are prohibited under the Establishment Clause. See Florey v. Sioux Falls School District 49-5, 619 F.2d 1311 (8th Cir.), cert. denied, 49 U.S.L.W. 3351 (1980). Inevitably, for example, this requires school officials to determine whether a particular practice is religious and therefore prohibited, or non-religious and permissible. Thus, this Court has explicitly held that religious literature such as the Bible may be taught in an objective fashion, but may not be used for opening exercises. School District of Abington Twshp. v. Schempp, supra, 374 U.S. at 224. Determining whether a particular use of the Bible is permissible requires school officials, and ultimately the

courts, to undertake the very inquiry that the Court below believed was constitutionally forbidden.[4/]

B. The Rule Does Not Unconstitutionally Inhibit Religion

The more fundamental error of the Court below occurred in its discussion of the effect branch of the tripartite test. Not only did the Court adopt the "the primary effect" test rejected by this Court in PEARL v. Nyquist, supra, 413 U.S. at 783 n.39, but its determination that the Rule had the impermissible effect of inhibiting and stigmatizing religion (see p. 17 supra) would eviscerate the Establishment Clause, for as we have noted, the

4. See Wiley v. Franklin, 468 F.Supp. 133 (E.D. Tenn.), on reconsideration, 474 F.Supp. 525 (E.D. Tenn. 1979) on further consideration, 497 F.Supp. 390 (E.D. Tenn. 1980).

Establishment Clause was designed to inhibit certain religious activity. The Rule does not inhibit religion beyond what the Constitution demands.

The history of the Establishment Clause has often been recounted in this Court's opinions. PEARL v. Nyquist, supra; Engel v. Vitale, supra; McCollum v. Bd. of Educ., supra; Everson v. Bd. of Educ., 330 U.S. 1 (1947). Undoubtedly, all those who supported the principle of disestablishment in this country did not do so for the same reasons. Some, like Thomas Jefferson, were concerned primarily with the protection of the state from religious influences. Others, like Roger Williams, wished to protect the church. Still others, chiefly James Madison, wished to protect both. Brandon v. Bd. of Educ., F.2d

(2d Cir. 1980), petition for certiorari filed, No. 80-1396. It is beyond question, however, that there was agreement on the need to limit the government's identification with religion. Maintenance of a clearly perceived delineation between church and state requires a prohibition not only of explicit aid to religion (such as a formally established church) but of those practices which create the impression of identification. The Establishment Clause thus singles out religion but it does not, as the Court below concluded, stigmatize religion. It is, of course, absurd to suggest that the First Amendment violates its own commands.

Behind the calmly phrased legal arguments in this case lies a broader, more heated argument. The separation of

church and state is not merely a matter for lawyers and political scientists. Churches and theologians have also debated the proper relation between the two. Not all religious groups are theologically comfortable with the separation principle, for it means that there is a sphere of activity where religion has no place. It must be admitted that the Establishment Clause does limit religion's role in our society. It places a limit on the influence that religion can have on governmental policy. But, as interpreted and applied by this Court, it does so not from hostility to religion but, as Justice Clark remarked in Engel v. Vitale, supra, in order to protect religion from misuse by government, and more importantly, because in this multi-cultural society it

simply can be no other way.[5/]

We agree, of course, that a governmental practice or regulation not required by the Establishment Clause which inhibits religion is unconstitutional under that Clause unless justified by some compelling state interest. But, as we demonstrate in the following section of this brief, the restrictions contained in the Rule are constitutionally required and do not, therefore, unconstitutionally inhibit religion.

III. The Establishment Clause Prohibits A Tax-Supported and State-Operated University from Providing Space to a Religious Group for Worship and Promotion of Religion

5. We do not mean to suggest that religious groups and leaders cannot participate fully in the debate on public issues. McDaniel v. Paty, 435 U.S. 618, 640-41 (1978) (Brennan, J., concurring); Walz v. Tax Commission, supra, 397 U.S. at 670.

In the present case, there are five essential facts:

1. Cornerstone's attempt to use a tax-supported public university's facilities for regular religious worship.

2. Cornerstone's proselytism and its desire to spread its religious beliefs.

3. Cornerstone's attempt to obtain financial and physical support from a tax-supported public university.

4. Cornerstone's efforts to gain the imprimatur of the University for its religious program because it believes that imprimatur will materially advance its ability to carry out its mission.

5. Cornerstone's desire to be recognized in order to counter "the kind of thinking which holds that religion is

obsolete and has nothing to do with the realities of life."

We submit that these facts compel the conclusion that permitting Cornerstone to conduct its program on the University of Missouri campus would not be constitutionally permissible.

The Establishment Clause, in the words of Justice Black "means at least" that

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another .... No tax in any amount, large or small can be levied to support any religious activities or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion ....

Everson v. Bd. of Educ., supra, 330 U.S. at 15-16.

In view of the evils that the First Amendment was designed to suppress, its prohibition of religious establishments goes far beyond merely forbidding a national or state church and includes all "steps that could lead to such establishment." Lemon v. Kurtzman, supra, 403 U.S. at 612.

A. The Rule Properly Forbids The State from Extending Financial Assistance to Religion

Should the University of Missouri be forced to allow religious groups to use its facilities for religious worship and teaching, as it would if the Rule were invalidated, public funds would be channeled to the aid of religion. This specific form of aid, as this Court said in Hunt v. McNair, 413 U.S. 734, 743 (1973), will "normally be thought to have a primary

effect of advancing religion ... as it funds a specifically religious activity in an otherwise substantially secular setting."

We submit that the District Court's decision was correctly anchored on Tilton v. Richardson, 403 U.S. 672 (1971), which focused on the "advancement of religion" resulting from the use of tax-supported public university buildings for religious purposes. The issue in that case was the constitutional validity of federal grants to church-related educational institutions. Under the Higher Education Facilities Act of 1963, 77 Stat. 364, as amended, 20 U.S.C. §§ 711-721, federal financial aid was granted to educational institutions by way of construction grants for buildings and facilities designed to be used only

for secular educational purposes. The Act provided, however, that the limitation to secular use would expire after 20 years. This Court held that this provision had the direct effect of aiding religion and that it therefore violated the Establishment Clause. It said:

> It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribuiton of some value to a religious body .... If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

403 U.S. at 683.

This decision establishes that allowing use of university space created with tax funds for religious worship and

study would have a direct and substantial effect of advancing religion. In both Tilton and the present case, the critical fact is the same -- the use, for religious worship and study, of facilities in a tax-supported institution of higher education.

The Court below distinguished Tilton on the ground that it was concerned

> that a sectarian college would be granted exclusive control of a government financed building on its campus and could devote that building to its own religious purposes. The neutral accommodation by a public university of students whose activities are religious is far different than the total dedication of government funded buildings to a sectarian institution for sectarian purposes.

These distinctions are untenable. The statutory prohibition on sectarian instruction or religious worship applied to both sectarian and public universities

which accepted federal construction grants. More importantly, the statutory prohibition, subsequent to Tilton, on sectarian uses is total, and applies to any such use. It could not be otherwise, for the Constitution forbids any financial aid to religion.

Such aid has been found impermissible in a series of lower federal and state court cases involving high school religious clubs. Brandon v. Bd. of Educ., supra; Hunt v. Bd. of Educ., 321 F.Supp. 1263 (S.D. W. Va. 1971); Trietley v. Bd. of Educ., 65 A.D. 2d 1, 405 N.Y. Supp. 2d 912 (4th Dept. 1978); Johnson v. Huntington Beach Union H. S. Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, (Fourth Dist.), cert. denied, 434 U.S. 877 (1977). Contra: Lubbock Civil Liberties Union v.

Lubbock Independent School District, F.Supp. , C.A. 79-1194 (N.D. Texas 1980), appeal pending, 80-2384 (5th Cir.); Cf. Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965), cert. denied, 382 U.S. 957 (1965).

The Court below recognized that permitting Cornerstone to meet on campus constituted "financial support" but found the amount "would be minimal." It based its reversal of the District Court decision on this Court's statement in Walz v. Tax Commission, supra, 397 U.S. at 668, that, for those who wrote the First Amendment, "the establishment of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." It apparently believed that such minimal support was not

proscribed under Walz v. Tax Commission, supra. We submit, however, that Walz established no de minimis rule. Since Everson v. Bd. of Educ., supra, this Court has stated and restated the principle that "No tax in any amount, large or small, can be levied to support any religious activities or institution ...." Tilton v. Richardson, supra, 403 U.S. at 680. And, unlike the financial aid to institutions of higher education in Roemer v. Bd. of Public Works, 426 U.S. 736, (1976); Hunt v. McNair, supra, 413 U.S. 734 (1973); and Tilton v. Richardson, supra, in which this Court was able to determine that none of the state funds flowed to a "specifically religious activity," Roemer v. Bd. of Public Works, supra, 426 U.S. at 759-60, the aid here flows directly to religious activities.

In any case, the financial aid sought by Cornerstone is not negligible. The immediate practical advantages flowing from use of University property would certainly be more substantial than those found invalid in Tilton -- possible use of such property more than 20 years in the future. They include the costs of heating, lighting and maintenance as well as the "rental value" of the space. Indeed, PEARL v. Nyquist, supra, 413 U.S. at 774-80, invalidated as an establishment, a New York scheme designed to assist parochial schools in meeting maintenance expenses 6/

6. Likewise, in Roemer v. Bd. of Public Works, supra, 426 U.S. at 760, this Court noted with evident approval a rule which prohibited the use of state funds for the maintenance or repair of a building used for "religious worship or for any religious activity."

defined to include heating, lighting and maintenance costs.

Moreover, more is involved than the benefit to this one group. If petitioners, voluntarily or under compulsion of judicial decree, granted Cornerstone's request, it would have to give equal treatment to all other religious groups requesting it. Niemotko v. Maryland, supra. This would certainly constitute a substantial, tangible drain on the public treasury and therefore the taxpayers of Missouri.

B. Cornerstone Impermissibly Seeks to Achieve Governmental Approval

Although the Establishment Clause prohibition on financial aid is sufficient reason to uphold the validity of the Rule,[7/] there is an even more compelling

7. Although we believe that the Rule's prohibition on the use of university facilities is constitutionally compelled, that much of the Rule

reason. Cornerstone seeks, and invalidation of the Rule would result in, government's imprimatur on its activities. Cornerstone sought recognition not only because it would be more convenient for students to attend its meetings if they were held on campus, but in order to convey its message to other students "that religion is [not] obsolete and [that it] has ... to do with the realities of life." It argued that this governmental ratification of its religious beliefs would make it a far more effective religious organization.

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which permits university officials to offer officially approved prayers at specified occasions is undoubtedly unconstitutional. The University is forbidden to sponsor all religious activities, not just those which do not meet with its approval. Moreover, "it is no business of government to compose official prayers for any group of the American people." Engel v. Vitale, supra, 370 U.S. at 425.

That the granting of such approbation is not the proper role of government vis-a-vis religion is obvious. This Court held, for example, only this term in Stone v. Graham, supra, 101 S.Ct. at 194, that the posting of the Ten Commandments (even in the absence of any state expenditure) established religion by "provid[ing] the "official support of the State ... Government" that the Establishment Clause prohibits. [School District of Abington Twshp v. Schempp, supra, 374 U.S.] at 222, see Engel v. Vitale, 370 U.S. 421, 431 (1962)." The posting did so by suggesting that school children should "read, meditate upon, perhaps ... venerate and obey" the Commandments. Stone v. Graham, supra. Similar reasoning underlies the decisions in School District of Abington Twshp.

v. Schempp, supra, and Engel v. Vitale, supra. It is precisely such approval that Cornerstone seeks. Surely, it cannot be doubted that the University could not recognize the Presbyterian Church, for example, as the official school religion. Although different in degree, recognition of Cornerstone is no less objectionable.

There is no better proof that such an imprimatur exists than respondents' own admission to this effect. They are, however, not alone in perceiving the existence of such an impermissible effect. All but one of the courts which have considered the validity of similar rules in the high school context have concluded that it is constitutionally impermissible to allow religious clubs to meet on school grounds because the state would be perceived as

endorsing religion.[8/] See pp. 32-33 supra.

The result in those cases, we submit, is compelled by this Court's holdings in Zorach v. Clausen, 343 U.S. 306 (1953); and McCollum v. Bd. of Educ., 333 U.S. 203 (1948). Together, these cases hold that public institutions of education may not be made available for religious education or worship:

> This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks are paid by the religious organizations. The case is therefore unlike McCollum v. Board of Education, which involved a "released time" program from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion or prohibiting

> its free exercise. (footnotes omitted)

Zorach v. Clausen, 343 U.S. at 308-09.

CONCLUSION

The position urged by Cornerstone is but one reflection of the views of that part of the population which disagrees generally with the interpretation placed by this Court on the Religion Clauses of the First Amendment. There are many who hold, sincerely and even passionately, that government institutions may and should be used to foster their religious tenets or, at least, some generalized form of religion. To the extent that persons holding this view urge that the Constitution should be amended to embody it, they are acting well within our constitutional traditions. To the extent, however, that

they urge that the First Amendment be rewritten by the courts to mean something not intended by its draftsmen, they are wrong.

We submit that the decision below constitutes such a rewriting. Its affirmance would signal a grave impairment of the protection which the Religion Clauses now give to all religious groups. It should therefore be reversed.

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No. 80-689

IN THE

Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, *et al.*,

Petitioners,

v.

CLARK VINCENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, respectfully move this Court for leave to file the accompanying brief *amicus curiae* in support of the position of petitioners requesting that this Court reverse the decision below which held that University of Missouri Regulation 4.0314.0107 is unconstitutional.

Consent to file the attached brief has been sought from the parties. Petitioners have stated that it is their general

policy not to consent to or oppose the filing of *amicus curiae* briefs. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States.

The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. The Anti-Defamation League believes that religious worship and teaching conducted in public educational institutions violates the First Amendment to the Constitution and fails to promote respect and understanding of individuals' religious differences.

In support of the separation of church and state and the right to free exercise of religion, the Anti-Defamation League has previously filed *amicus* briefs before this Court in numerous cases involving the Religion Clauses of the First Amendment. *E.g., Wolman* v. *Walter,* 433 U.S. 229 (1977); *Meek* v. *Pittinger,* 421 U.S. 349 (1975); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all per-

sons' religious freedoms. It respectfully offers this Court its accumulated experience with the issues raised by this case.

The *Amicus* seeks to submit the accompanying brief because it believes this case presents to this Court a serious challenge to the separation of church and state in our public educational institutions.

Respectfully submitted,

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CLARK VINCENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONERS

The Anti-Defamation League of B'nai B'rith respectfully submits that the judgment of the United States Court of Appeals for the Eighth Circuit in the above-captioned case should be reversed.

Interest of the *Amicus Curiae*

B'nai B'rith, found in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith

to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is committed to the protection of the civil rights of all persons and towards assuring that every individual enjoys those rights regardless of his or her race or religion.

In its pursuit of these goals, the Anti-Defamation League has, as an important priority, always adhered to the principle that the aforementioned goals and the general stability of our democracy is best served through the separation of church and state. The Anti-Defamation League believes that religious worship and teaching conducted in public educational institutions is violative of the First Amendment to the Constitution and does not promote respect and understanding of individuals' religious differences.

Summary of Argument

Respondents' rights under the Free Exercise Clause were not abridged by University of Missouri Regulation 4.0314.0107. Respondents are able to practice their religion as they desire; they simply have to do so in a private residence 1½ blocks from, rather than on, the campus. The regulation may inconvenience respondents, but it is not coercion which rises to the level of a constitutional violation.

Should the Court find that respondents' Free Exercise rights were violated, it must then determine whether there

are appropriate state interests which override the Free Exercise interest. In the instant case, the Free Exercise claim is outweighed by petitioners' interest in ensuring that the Establishment Clause is not violated. For petitioners to permit religious worship and teaching at public universities would have the principal or primary effect of advancing religion.

When the Free Exercise Clause clashes with a compelling state interest, such as the Establishment Clause, an accommodation may be mandated when the state regulation makes illegal a core practice of a religion or when the state places the individual in a geographic location where the exercise of core religious practices is impossible without an accommodation. Neither of these situations is before the Court in the instant case; thus, no accommodation is required.

This Court has held on numerous occasions that the Establishment Clause forbids the intrusion of religious worship into public educational institutions. These decisions are controlling. The Circuit Court below has suggested, however, that public colleges should be treated differently from public secondary schools for Establishment Clause purposes. The arguments in support of such a bright line distinction are arbitrary and logically indefensible.

ARGUMENT

I.

In order to prevail, petitioners need only demonstrate that the regulation in question is "permissible."

This case comes to the Court in a somewhat different posture from prior cases involving the intrusion of religion into public educational institutions. In cases such as *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), and *Engel* v. *Vitale,* 370 U.S. 421 (1962), the state had actively encouraged religious activity, and therefore the question was whether the state action constituted an impermissible "establishment" of religion. Here, the state has, in the exercise of its discretion, exhibited a sensitivity for "establishment" concerns and has refused to permit religious worship and teaching on school grounds. Thus, the focus of this case is on whether the state has violated respondents' Free Exercise rights (or other constitutionally protected rights). Only if the Court determines that there has been such a violation must the Court reach the question of whether the state's policy is nonetheless constitutionally permissible by virtue of the Establishment Clause or some other valid state interest. *Brandon* v. *Board of Education,* 635 F.2d 971 (2d Cir. 1980); *Dittman* v. *Western Washington University,* No. C79-1189V (W.D. Wash. Feb. 27, 1980), *appeal docketed,* No. 80-3120 (9th Cir. April 7, 1980); *Hunt* v. *Board of Education,* 321 F. Supp. 1263 (S.D. W. Va. 1971).

We submit that, as applied to the facts before this Court, University of Missouri Regulation 4.0314.0107 (the "Uni-

versity Regulation")* is mandated by the Establishment Clause. Nevertheless, this Court need not reach that issue in order to hold for petitioners. As regards the interaction of the state and religion, there are certain state activities which are proscribed, certain which are mandated and certain which are permissible, but are neither proscribed nor mandated. *See Walz* v. *Tax Commission,* 397 U.S. 664 (1970). An example of the permissible type of activity is state reimbursement of funds expended by parents for bus transportation of their children to parochial schools. The state is neither required nor forbidden to provide such reimbursement. *See Everson* v. *Board of Education,* 330 U.S. 1 (1947). The instant case is identical in this regard. In order to hold for petitioners, the Court need not find that the Constitution compelled petitioners to adopt the University Regulation. Rather, it is sufficient to find that petitioners acted within the range of discretionary authority permitted to school officials by the Constitution.

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* Regulation 4.0314.0107, which has been in effect at all campuses of the University of Missouri since 1972, states:

> "No university buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons, under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching . . ."

II.

Respondents' Free Exercise rights have not been abridged.

The Free Exercise Clause embodies the freedom to believe and the freedom to act. "The first is absolute but, in the nature of things, the second cannot be." *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-04 (1940). To demonstrate an infringement of Free Exercise rights, an individual must prove "the coercive effect of the [state] enactment as it operates against him in the practice of his religion." *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 223 (1963). In determining whether there has been a violation of the Free Exercise Clause, the Court must examine the relative importance of a particular religious practice and the degree to which the exercise of that practice has been impeded by the state action. *See, e.g., Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963). Where persons are not significantly encumbered in the practice of their religion, the state action does not constitute a violation of the Free Exercise Clause. *Brandon* v. *Board of Education, supra.*

In the district court, respondents submitted the affidavit of Frederick Chess, a student involved with Cornerstone,* to explain the organization's religious beliefs and practices and the impact of the University Regulation upon such practices.** In the affidavit, Mr. Chess states that for

* Respondents are part of a religious group called Cornerstone which is an officially recognized student group on the University of Missouri-Kansas City (the "University") campus. Cornerstone's stated purpose is to "'promote a knowledge of Jesus Christ among students'." *Chess* v. *Widmar,* 635 F.2d 1310, 1313 (8th Cir. 1980).

** It appears uncontroverted that the regulation does not affect beliefs.

Cornerstone to accomplish its religiously motivated objectives, "we [Cornerstone] must meet together, provide a forum for our message, and have a place for interested students to meet with us." *Chess* v. *Widmar,* 480 F. Supp. 907, 911 (W.D. Mo. 1979), *rev'd,* 635 F.2d 1310 (8th Cir. 1980). Manifestly, there is nothing intrinsic to these practices which relates to whether they need be conducted at the University or off-campus. In fact, Mr. Chess later admits that the group has "of course" continued its religious program and meetings in a house located "only about a block and a half from the campus." 480 F. Supp. at 911, 912.

Cornerstone's holding of its religious meetings a short distance from campus is vivid evidence that the University Regulation has had little, if any, coercive impact upon respondents' practice of their religion. Mr. Chess' affidavit, however, attempts to refute this conclusion by listing the "many unfortunate disadvantages" of Cornerstone being compelled to conduct its meetings off-campus. 480 F. Supp. at 911-12. Some of the "disadvantages" clearly do not rise to the level of a constitutional claim, *e.g.,* there is somewhat more physical space in a University meeting room than at Cornerstone's off-campus meeting place. The other "disadvantages" are, under closer scrutiny, not disadvantages at all, but are simply demands to have the state's imprimatur placed upon Cornerstone, *e.g.,* Cornerstone's proselytizing efforts would be greatly enhanced were it permitted to hold services on campus. The refusal to aid such religious activity is not state action barred by the Free Exercise Clause; rather, it is state action permitted, if not mandated, by the Establishment Clause. *See* Section III, *infra.*

As the district court concluded in finding that respondents' Free Exercise rights had not been infringed by the University Regulation,

> "The facts before this Court simply do not establish that the 'practice' of holding religious services in a university-owned building is a matter of deep religious conviction to these plaintiffs. At most, the parties' stipulations support a finding that plaintiffs *prefer* having their religious services in a university-owned building to having the services in a building or home off-campus." 480 F. Supp. at 917.

As such, the University has not significantly impeded respondents' ability to practice their religion. The University has merely acted so as to ensure that it takes, and is perceived as taking, a neutral position as regards religion.

Moreover, the Free Exercise arguments raised here by respondents have been rejected by this Court. In *McCollum* v. *Board of Education, supra,* students were forbidden to attend religious classes in the public schools. Similarly, in *School District of Abington Township* v. *Schempp, supra,* the Court explicitly rejected the Free Exercise claim of students and teachers who were denied the right to offer prayer in the public schools. 374 U.S. at 225-26.

Courts which have considered this issue have clearly held that the refusal to permit students to worship on the grounds of public elementary and secondary schools does not impose the degree of coercion which rises to the level of a Free Exercise violation. *See* Section V, *infra.* In *Brandon* v. *Board of Education, supra,* the Court of Appeals for the Second Circuit held that the refusal to permit com-

munal prayer meetings in a public high school did not violate the Free Exercise Clause because the students were free to worship together as they pleased "in a church or any other suitable place." 635 F.2d at 977. Similarly, the Appellate Division of the New York Supreme Court held in an analogous situation that students' Free Exercise rights were not contravened since they ". . . are free to pursue their religious beliefs; they are only prevented from enlisting the aid of the public school system to do so." *Trietley* v. *Board of Education,* 65 A.D.2d 1, 8, 409 N.Y.S. 2d 912, 917 (1978). *See also Stein* v. *Oshinsky,* 348 F.2d 999 (2d Cir. 1965), *cert. denied,* 382 U.S. 957 (1965). So too, the Free Exercise rights of respondents have not been violated as they can practice their religion anywhere save on the public university campus.

III.

Petitioners had a valid Establishment Clause interest in promulgating and enforcing the University Regulation.

If this Court finds, however, that petitioners violated respondents' Free Exercise rights, it must then consider whether there are appropriate state interests which override that violation. *Wisconsin* v. *Yoder, supra.* We submit that there are.

To the draftsmen of the First Amendment, "the 'establishment' of a religion connoted sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission, supra,* 397 U.S. at 668.

A statute violates the Establishment Clause if it does not satisfy all of the following requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with with religion'." *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971). In *Stone* v. *Graham,* —— U.S. ——, 101 S.Ct. 192, 193 (1980), the Court reasserted the vitality of this tripartite test, holding that if a statute violated any part of the test, it must be struck down.

If religious worship and religious teaching (as distinguished from objective teaching about religion) were permitted on the University campus, the principal or primary effect would clearly be to advance religion. As such, the petitioners had a valid Establishment Clause interest in promulgating the University Regulation.

First, permitting Cornerstone to use a campus classroom for religious worship would have the "primary effect" of advancing religion since the "state's tax-supported buildings [would be] used for the dissemination of religious doctrines." *McCollum* v. *Board of Education, supra,* 333 U.S. at 212. *See also Everson* v. *Board of Education, supra,* 330 U.S. at 16. In providing free use of facilities to a religious group, petitioners would in effect be subsidizing religious worship. While this Court has permitted, on a limited basis, some indirect financial support to parochial schools, *e.g., Wolman* v. *Walter,* 433 U.S. 229 (1977), it has never sanctioned this type of direct financial support of religion in the public schools.

Second, the use of public facilities for religious worship and teaching would place the imprimatur of the state upon the religious doctrines being espoused. *School District of Abington Township* v. *Schempp, supra,* 374 U.S. at 215-19; *Dittman* v. *Western Washington University, supra, slip op.* at 5. The significance of having the governmental imprimatur placed upon religious worship is heightened when it is recognized that one of the main goals of many religious groups is to convert others. This is particularly true in the case of Cornerstone whose stated purpose is "to attract the uninvolved." *Chess* v. *Widmar, supra,* 480 F. Supp. at 911. At Cornerstone meetings, non-members are "encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth." *Id.* at 910.

To impressionable college students who are in a transitional period of their lives, this imprimatur can most certainly confuse them as to the proper relationship between church and state. *See* Section V, *infra.* Further, Cornerstone's meetings are open to the public and thus could be attended by persons (including minors) not affiliated with the University. *Chess* v. *Widmar, supra,* 480 F. Supp. at 910, 911. Significantly, Cornerstone is one of the most active organizations on campus, *id.* at 911; and thus, the nature and location of its meetings are assumedly transmitted to a wide spectrum of persons. Many persons not familiar with the University's position of neutrality regarding religion will be misled should Cornerstone—an avowedly religious club—be permitted to hold its worship services on campus.

Third, a ruling for the respondents would undoubtedly result in a proliferation of religiously-oriented activity at the University and other campuses. Conceivably, adherents of large denominations could hold daily services in university assembly halls and on university lawns with thousands of worshippers. In contrast, some small sects might not even have enough followers at a university to be able to, or to want to, have services. Students belonging to these smaller and non-participating groups "will thus have inculcated in them a feeling of separatism when the [public] school should be the training ground for habits of community. . . ." *McCollum* v. *Board of Education, supra,* 333 U.S. at 227 (Frankfurter, J., concurring). If college students wish to attend a school with a sectarian atmosphere, they may do so; public universities must remain a non-sectarian alternative. *See School District of Abington Township* v. *Schempp, supra,* 374 U.S. at 241-42; (Brennan, J., concurring).

On five occasions the Supreme Court has been faced with the question of whether to permit the intrusion of religious practices into public educational institutions, and on each occasion the Court has unequivocally forbidden any such incursion. *Stone* v. *Graham, supra* (posting of Ten Commandments in public schools); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) (striking down statutes forbidding teaching of evolution in public schools and colleges); *School District of Abington Township* v. *Schempp, supra,* and *Engel* v. *Vitale, supra* (prayer in public schools); *McCollum* v. *Board of Education, supra* (religious teaching on public school grounds). The principles which guided the Court in these decisions are no less controlling in the instant case.

Illustrative is *McCollum* v. *Board of Education, supra,* where the Court struck down a program permitting teachers employed by private groups to offer religious instruction in the public schools. No students were compelled to attend the classes, and different religious groups had their own classes. The Court held this program to be violative of the Establishment Clause because tax-supported buildings were being utilized for religious teaching, and "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . ." 333 U.S. at 210. Justice Frankfurter, in an oft-cited concurring opinion, stated:

> "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." 333 U.S. at 231.

McCollum mandates the conclusion that petitioners were motivated by proper Establishment Clause concerns in promulgating and enforcing the University Regulation. Were the University to permit respondents and other religious groups to conduct religious teaching in campus buildings, it would be authorizing the very activity proscribed in *McCollum.* The only distinction lies in the fact that *McCollum* involved elementary and secondary schools, while the instant case involves public colleges. This distinction is irrelevant because in both cases, religious groups are aided by being permitted free use of tax-supported buildings. *See also* Section V, *infra.*

This Court's opinions in other cases involving public educational institutions again demonstrate the paramount significance of keeping church and state separate in the schools. As Justice Clark stated in *Schempp,*

> "Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' " 374 U.S. at 225.

A number of lower courts have been faced with analogous fact patterns in which public secondary schools have denied permission to student groups to use classrooms for religious worship or teaching during the school day. These courts have uniformly upheld the schools' position on the grounds that to permit worship in the public schools would violate the Establishment Clause. *E.g., Brandon* v. *Board of Education, supra; Johnson* v. *Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), *cert. denied,* 434 U.S. 877 (1977). As such, petitioners' position should be upheld.

IV.

The strong Establishment Clause interest justifying the University Regulation outweighs respondents' Free Exercise claim.

This Court has held that where the Establishment and Free Exercise Clauses clash, courts must balance the competing interests. In *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756, 788-89 (1973), the Court made clear that in this balancing process extreme care must be taken to ensure that longstanding Establishment Clause principles are not compromised:

> "... this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, *e.g., Everson* v. *Board of Education, supra; Walz* v. *Tax Comm'n, supra,* and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion ... However great our sympathy ... for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience and discipline,' *ibid.,* and notwithstanding the 'high social importance' of the State's purposes, *Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted."*

* This statement refutes respondents' argument that this Court has made the Establishment Clause subordinate to the Free Exercise Clause. Further, the language of the First Amendment demonstrates clearly that neither clause is predominant over the other.

Decisions of this Court demonstrate that when the Free Exercise Clause clashes with the Establishment Clause (or some other compelling state interest), an accommodation may be required in two situations: (1) when the state regulation makes illegal a core practice of a religion; and (2) when the state places the individual in a geographic location where the exercise of core religious practices is impossible without an accommodation.* Here neither factor is present and thus no accommodation is necessary.

Sherbert v. *Verner, supra,* and *Wisconsin* v. *Yoder, supra,* demonstrate the application of the first type of required accommodation. In *Sherbert,* the Court held that it was a violation of the Free Exercise Clause for South Carolina to apply the eligibility provisions of its unemployment compensation statute so as to deny benefits to a claimant who, because of her religious beliefs, had refused employment which would have required her to work on Saturday. In striking down the state regulation, the Court repeatedly emphasized that Sabattarianism was "one of the precepts of her [appellant's] religion." 374 U.S. at 404. The Court stated that "[n]or is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed [appellant's religion], based upon that religion's interpretation of the Holy Bible." 374 U.S. at 399, n.1.

Similarly, in *Yoder,* an accommodation was required because the state action had impinged upon core practices

* It should be noted that in neither of these situations is an accommodation always required. The competing state interest can be so strong that it outweighs any Free Exercise claim, *e.g.,* in the case of polygamy or ritual murder.

of the respondents' religion. The Court held that the Free Exercise Clause prohibited the state from applying its compulsory education law as to the Amish because this law required them "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. The Amish objected to sending their children to public or private school beyond the eighth grade because of a "fundamental belief" that salvation requires life in a church community separate and apart from the world and worldly influence. 406 U.S. at 210.

Of significance is that both *Sherbert* and *Yoder* cite with approval *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). In *Braunfeld*, the Court upheld the constitutionality of Sunday closing laws despite appellants' contention that "this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath." 366 U.S. at 602. The Court did not view the choice so starkly, but admitted that appellants may be forced to absorb "some financial sacrifice in order to observe their religious beliefs." 366 U.S. at 606. Examining *Yoder*, *Sherbert*, and *Braunfeld*, it is clear that where the Free Exercise Clause clashes with an important state interest (such as the state's responsibility not to transgress the Establishment Clause), an accommodation should not be required in all circumstances, but only when an individual's core religious practices have been impinged upon.

An examination of the instant case demonstrates that petitioners have not impeded respondents in the exercise of

any core practices of their religion. Respondents state that their religion requires them to meet together, provide a forum for their teachings and have a place where interested students can meet with them. *Chess* v. *Widmar, supra,* 480 F. Supp. at 911. The University Regulation does not impinge upon these pratices at all. It simply inconveniences respondents in that they have to conduct their services in a house located about 1½ blocks from the campus. If a sincerely-held fundamental tenet of respondents' religion required all services to be held on campus, then respondents might be able to demonstrate that the state has proscribed a core practice. However, as such a showing has not been made, the strong Establishment Clause interest overbalances respondents' Free Exercise claim.

This Court has also recognized that Free Exercise clause interests may override the Establishment Clause interest when the government places an individual in a geographic position where exercise of his core religious practices would be impossible without an accommodation. Examples of accommodations permitted under this theory are chaplains in the army and in prisons. In *School District of Abington Township* v. *Schempp, supra,* the Court rejected the type of Free Exercise argument made by respondents in the instant case, but noted as follows:

> "We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths." 374 U.S. at 226, n.10.

This theory would support the type of accommodation requested by the instant respondents where there is an isolated public university, all the students live in dormitories owned by the university and there are no private houses or possible meeting places for miles around. An accommodation would also be permissible where core religious practices had to be performed at an hour when university rules made it impossible to be off-campus. In the instant case, neither of these situations is present as respondents admit that they can meet 1½ blocks from campus at an appropriate time.

In similar factual situations, courts have consistently held that any Free Exercise rights at issue are overridden by the Establishment Clause interest. In *Brandon* v. *Board of Education, supra,* the Second Circuit upheld a public school regulation similar to that imposed by the University. The Second Circuit held that the students' Free Exercise rights had not been abridged, and that if there was any infringement, it was permissible because of the Establishment Clause interests at stake. The court balanced the Free Exercise Clause and Establishment Clause interests and held that an accommodation was only required in certain narrow, well-defined instances:

> "We do not have before us the case of a Moslem who must prostrate himself five times daily in the direction of Mecca, or children whose beliefs require prayer before lunch, sports or other school activities. *Stein* v. *Oshinsky, supra,* 348 F.2d at 1001-02. If faced with these religious demands from students, a school board might have to make additional accommodations to per-

> mit the students to withdraw momentarily from the class. *See Zorach* v. *Clauson*, 343 U.S. 306, 313-14, 72 S.Ct. 679, 683-684, 96 L.Ed. 954 (1952). We have not been convinced, however, that the religious needs of the 'Students for Voluntary Prayer' require such accommodation." 635 F.2d at 977.

Other courts considering the issue have uniformly reached a similar conclusion. *E.g., Stein* v. *Oshinsky, supra; Dittman* v. *Western Washington University, supra.* Succinctly put,

> "This is not a case where plaintiffs are denied access to all public forums for religious expression; they are merely being denied use of school property during the school day for religious purposes. This deprivation in no way infringes upon their religious rights when practiced outside the confines of the school. Plaintiffs are only being denied religious expression in a manner involving state participation. Each club member remains free to believe and express his religious beliefs on an individual basis and the students' Bible study club is free to meet as such off campus outside of school hours. There is no infringement of plaintiffs' free exercise rights except to the limited extent made necessary by the establishment clause of the state and federal Constitutions." *Johnson* v. *Huntington Beach Union High School District, supra,* 68 Cal. App. 3d at 17, 137 Cal. Rptr. at 52-53. *See Kent* v. *Commissioner of Education,* —— Mass. ——, 402 N.E. 2d 1340, 1345 (1980).

V.

There is no valid rationale for treating public universities differently from public secondary schools in terms of the use of facilities for religious worship and teaching.

Were the setting for this lawsuit a public secondary school, it appears certain the petitioners would easily prevail. This Court has held on numerous occasions that the Establishment Clause forbids the intrusion of religious worship into such premises. However, those courts which have ruled on this issue in the public university context have reached varied conclusions. The apparent reason for this is that certain courts believe that there are significant differences between high school and college students which permit different applications of the Establishment Clause. Those rationales asserted in favor of disparate application of the Establishment Clause are, we submit, arbitrary and logically indefensible:*

A. In *Tilton* v. *Richardson,* 403 U.S. 672, 686 (1971), the Court, in *dictum,* stated as follows: "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view. . . ." *See also Roemer* v. *Board of Public Works,* 426 U.S. 736, 764 (1976). It has been theorized that college

* It should be noted, however, that even if there were valid, relevant distinctions between high school and college students, respondents should not prevail. Whenever religious worship occurs at a public educational institution, the religious group is being financially supported through the use of taxpayers' funds, by being provided with free rent, heat and electricity. As discussed above, this is a primary effect which aids religion.

students, being less impressionable and less susceptible to religious indoctrination, will be less likely to perceive religious services on public university campuses as government support for religion. Thus, the theory continues, more accommodation is permissible at a public university than at a public secondary school because there would not be a primary effect which aids religion at the university. This theory is, we submit, without merit.

As a logical proposition, there is nothing magical which occurs in the two months between the time when a student graduates from high school and the time when he commences college. He does not automatically become less impressionable. As a matter of fact, experience instructs us that environmental factors render college freshmen at least as, if not more, impressionable than high school seniors. Generally, high school seniors are living a secure existence in which there are many support systems limiting their impressionability. They are living at home, have a group of friends whom they have known for years, belong to a local church or synagogue and feel comfortable in the school they have been attending for the last three or four years.

The student's support systems are, however, suddenly wihtdrawn when he enters college. Generally, he is living away from home (usually for the first time), most of his childhood friends are not attending the same college, he now lives far from his local church or synagogue, and he is in a new and strange environment. This loss of support systems creates in the student the need to create new ties. This need is combined with a feeling that for the first time

he is truly on his own and can explore alternative life choices without fear of parental disapproval. In short, the college freshman is often a seeker open to the possibility of investigating new ideas and religions. For such an impressionable individual, the fact that a religious group is permitted to hold services in university buildings can be significant indeed. The religious group is given instant legitimacy in the student's eyes.

Dr. Kathleen White, associate professor of psychology at Boston University, reports that college students, at least in the early years of college, are in what she characterizes as a "late adolescent" stage. K. White, *Problems and Characteristics of College Students,* Adolescence, Vol. XV (No. 57), pp. 23, 28 (1980). She notes that in this stage the college student is extremely impressionable:

> "The abandonment of conventional-level thinking appears to proceed through a number of identifiable steps. First, late adolescents may pass through a period of conflict and transition, when their moral judgments are marked by internal contradiction and an inconsistent moral relativism. During this 'Stage . . .' adolescents may insist simultaneously that all moral values are arbitrary (so, 'When in Rome . . .'), and that certain principles override all others ('Nothing is more important than human life.'). Such adolescents appear to understand and appreciate the value of individual freedom, but they also show considerable confusion over what is ethical and what is merely conventional." (citations omitted) *Id.* at 28.

This descriptive analysis is supported by empirical evidence on the age at which most individuals become converts to non-traditional religious groups. Some of these non-

traditional religions have been denominated as "cults" in literature on the subject. (See definition of "cult" in C. Stoner and J. Parke, All God's Children 3-4 [1977].) For an individual to renounce the religion of his birth and accept the beliefs and practices of another faith group unquestionably requires that individual to be in an impressionable state. As such, it is not surprising that the typical "cult" member is described as a " 'boy or girl eighteen to twenty-five,' " *id.* at 76, and as a "college student", L. Schwartz and F. Kinslow, *Religious Cults, the Individual and the Family,* Journal of Marital and Family Therapy, Vol. 5 (No. 2), pp. 15, 16 (1979); Stoner and Parke, *supra,* at 68, 76; T. Patrick and T. Dulack, Let Our Children Go! (1976).

B. The Court has suggested that it is particularly important to promote the separation of church and state in the public elementary and secondary school setting since it is there that the state has undertaken as a special mission the education of our youth. *See, e.g., McCollum* v. *Board of Education, supra,* 333 U.S. at 231 (Frankfurter, J., concurring). The Court's pronouncement has been interpreted by some to mean that since the state has embarked upon no such special mission with regard to educating college students, one need not be as vigilant in ensuring separation of church and state in the public university setting. This interpolation is irrelevant as it does not impact upon the considerations utilized by this Court to determine whether the Establishment Clause and the Free Exercise Clause have been violated, to wit, the tripartite test and the extent to which religious practices have been

impeded. Beyond this, however, this theory is based on an incorrect factual premise.

When *McCollum* was handed down in 1948, it was true that the state had not as yet embarked upon a special mission to educate college students. In contrast to elementary and secondary schools, college was perceived as something which could not be experienced by everyone. Private universities were comparatively expensive and exclusive, and there was no clarion call for the state to alter this situation. In 1950, only 40.6% of high school graduates went on to college,* National Center for Education Statistics, Digest of Education Statistics p. 15 (1980), and in Fall, 1948, less than 50% of college students attended public universities. United States Office of Education, 1948 Fall Enrollment in Higher Education, Circular No. 248 (1948).

Today, the nation's perception of higher education has changed dramatically. College is now seen as a valuable experience which is not only for the affluent. Today, 60% of high school graduates go on to college. National Center for Education Statistics, *supra,* at 15. More importantly, it is the state which has undertaken the mission of provid a college education to all our nation's youth. While difficult economic conditions have caused many private universities to shut down and have caused others to raise tuition fees dramatically, public university systems have been expanding. "Open admission" policies have been instituted by a number of public university systems, *e.g.,* New York, California. The statistics on the number of students in public universities versus private universities

* Data on the number of high school graduates going to college is not available for 1948, the year in which *McCollum* was decided.

demonstrate this changed state of affairs. In marked contrast to 1948, the most recent statistics published by the National Center for Education Statistics show that in Fall, 1979, 78.26% of our nation's college students attended public colleges.* *Id.* at 6.

As Professor Lawrence Tribe has noted, "Clearly, the religion clauses embody a concept of the relationship between religion and the state which must be modified to adapt to changing conceptions both of religion and of government." L. Tribe, American Constitutional Law 834 (1978). What was true in 1948 regarding the state's role in college education is not true today. Since the state has undertaken the mission of educating our youth from elementary school through college, there is no longer a valid rationale, if there ever was one, for differing applications of the Establishment Clause.

C. In ruling for the respondents, the Court of Appeals found the instant case distinguishable from one involving high school students who ". . . necessarily require more supervision than do young adults of college age . . ." *Chess* v. *Widmar*, 635 F.2d 1310, 1319 (8th Cir. 1980). While it is debatable whether college students necessarily require less supervision than those in high school, it is true that high schools more often require a teacher's presence at student meetings.

This distinction, however, is of little relevance to the instant case. As even the Eighth Circuit recognized, the

* Unpublished statistics received from the National Center for Education Statistics reveal that in Fall, 1980, the percentage of students in public universities had risen to 78.39%.

question of teacher supervision relates more to the "entanglement" prong of the Supreme Court's tripartite test than to the "effect" prong. 635 F.2d at 1319-20. Neither the district court nor *Amicus* suggests that this case be decided by the "entanglement" prong.

When a public educational institution permits religious worship on campus, it matters little whether or not there is a teacher present during the service. The relevant factor is that the state has placed its imprimatur upon the religious practice by allowing it to be conducted in a campus building in the same manner as all other school-sanctioned extracurricular activities—teacher-supervised in the high school setting but not in the college setting.

VI.

Other arguments raised by respondents are not persuasive.

Respondents argue that the University Regulation constitutes an unconstitutional prior restraint on their free speech rights and also violates the Equal Protection Clause.

These arguments were never addressed by this Court in its decisions on the intrusion of religion into the public school for the obvious reason that to accept such arguments would completely emasculate the Establishment Clause and require the incursion of religion into every aspect of government. Clearly, this is not the way our Constitution was designed to operate.

The University Regulation does not deprive respondents of their right to freedom of speech any more than this Court's decisions in *Engel, Schempp* and *McCollum* denied schoolchildren such rights. Students are not being denied the right to discuss religion, but simply the right to conduct religious worship and teaching in a public university. In such a setting, the Establishment Clause requires certain limitations on speech and associational rights. *Brandon* v. *Board of Education, supra,* 635 F.2d at 980; *Dittman* v. *Western Washington University, supra,* slip op. at 3. Further, a public university is not a "public forum" like a park or the National Mall. *See Synder* v. *Board of Trustees,* 286 F. Supp. 927, 933 (N.D. Ill. 1968). This Court has frequently discussed the paramount importance of keeping religious worship out of our public schools, and as shown in Section V, *supra,* such considerations are equally valid as applied to public universities.

Similarly, the University Regulation does not deprive respondents of their rights to equal protection under the laws any more than schoolchildren were denied such rights in *Engel, Schempp,* and *McCollum.* All groups, including religious groups, are permitted equal access to University facilities for any purpose except religious worship and religious teaching. This limitation on use applies to all groups and is mandated by the Establishment Clause. The Equal Protection Clause does not require what the Establishment Clause forbids. *Brandon* v. *Board of Education, supra,* 635 F.2d at 980; *Trietley* v. *Board of Education, supra,* 65 A.D.2d at 8, 409 N.Y.S.2d at 917.

Conclusion

In this case, the Court is once again called upon to prevent the establishment of religion in an educational institution owned and operated by the state. The Court has uniformly upheld the principle of the separation of church and state in public elementary and secondary schools. There is no legitimate rationale for abandoning this vital principle in the instant context.

Respectfully submitted,

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NO. 80-689

IN THE

Supreme Court of the United States

_____ TERM 1981

GARY E. WIDMAR, et al.,
Petitioners,

v.

CLARK VINCENT, et al.,
Respondents.

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE OF THE
ASSOCIATION FOR THE COORDINATION OF
UNIVERSITY RELIGIOUS AFFAIRS

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MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The Association For The Coordination of University Religious Affairs respectfully moves this Court, pursuant to Rule 36.3 of its Rules, for leave to file the accompanying brief amicus curiae in support of respondents in Widmar, et al. v. Vincent, et al., No. 80-689.

The consent of the parties to the filing of the attached brief has been sought by the moving party. While the

respondents gave their consent, petitioners, as a matter of policy, withheld their consent. Amicus, accordingly, proceeds under Rule 36.3.

The Association For The Coordination of University Religious Affairs (hereinafter referred to as the Association) is composed of professional university staff members assigned administrative responsibility for the coordination of religious affairs on private and state university campuses. The Association represents a multi-faith approach rather than one religion or one denomination. The Association does research into the place of religion on a univesity campus and aids its members in their jobs of counseling and coordinating student religious activities.

The Association is very much interested in this case. The decision of this Honorable Court will reach far beyond the confines of the campus at the University of

Missouri-Kansas City. The decision will affect every college and university in this country. For this reason the Association seeks to aid the Court by submitting this brief.

Therefore, amicus prays this court grant this motion and consider its accompanying brief which gives the bases and arguments for its support of respondents' position.

Respectfully submitted this ___ day of May, 1981.

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BRIEF AMICUS CURIAE OF THE ASSOCIATION FOR THE COORDINATION OF UNIVERSITY RELIGIOUS AFFAIRS

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BRIEF AMICUS CURIAE

I.

INTEREST OF AMICUS CURIAE

The Association For The Coordination of University Religious Affairs (hereinafter referred to as the Association) is composed of professional university staff members assigned administrative responsibility for the coordination of religious affairs on private and state university campuses. The Association represents a multi-faith approach rather than one

religion or one denomination. The Association does research into the place of religion on a univesity campus and aids its members in their jobs of counseling and coordinating student religious activities.

The Association is very much interested in this case. The decision of this Honorable Court will reach far beyond the confines of the campus at the University of Missouri-Kansas City. The decision will affect every college and university in this country. For this reason the Association seeks to aid the Court by submitting this brief. This brief will show the need to affirm the Court of Appeals for the Eighth Circuit.

The Association recognizes that the prior briefs filed in this case have covered a wide range of areas. The Association's brief will not cover all the possible areas of this case. Instead, the brief will concentrate on the university/

student relationship and the unique place of the university in our society. This will show the importance of the freedoms at the university and that the use of facilities does not equal establishment of religion. This brief will limit its discussion to United States constitutional rights since they cannot be changed by a state constitution and clearly dictate the proper result in this case. Furthermore, the brief will show the importance of the United States constitutional rights and that no state interest should be used to deny those rights.

II.

STATEMENT OF THE CASE

The facts were submitted in this case by stipulation of the parties. The essential facts have been stated in the opinions of the district court and the court of appeals. Only a brief summary

will be made here. Respondent students and the student group, Cornerstone, traditionally had the same right to free use of the facilities as other groups at the University of Missouri-Kansas City (UMKC). In 1977 the university sharply reversed this policy and refused Cornerstone the use of the facilities. However, the university continued to allow other groups the use of the facilities. Some of the other groups were named in a memorandum quoted in footnote number 1 of the court of appeals opinion: "SPECIAL INTEREST GROUPS-- . . . Jewish College Students, . . . Young Socialist Alliance . . . Karate Club . . . , etc."

The district court relied upon Tilton v. Richardson, 402 U.S. 672 (19__) and held that the university policy was required by the establishment clause. The district court rejected the student claims of free exercise violations, prior

restraint, equal protection violation, and that the regulations were vague and overbroad.

The court of appeals reversed the district court in a carefully reasoned opinion. The court of appeals held that access to a forum cannot be denied because of the content of the message. The court of appeals held the university's policy denied the students their First Amendment right of freedom of religion. The court of appeals next rejected the district court's holding that allowing neutral use of facilities would be establishment of religion. The court properly analyzed the Tilton case as dealing solely with direct government aid to a sectarian college, and not involving violations of First Amendment rights of students. Furthermore, occasional use of facilities is completely different from the total dedication involved in Tilton. Finally, the court of

appeals thoughtfully distinguished the university setting from cases involving high school students.

III.

ARGUMENT

A. This Case Involves Adults in a University Setting

At the outset, this case must be properly characterized. The student groups in question and the students bringing the suit are adults who are suing to allow the voluntary exercise of their religion. No coercion is involved nor has there been any condoning of the activity by the university. Instead, the students are suing to allow use of the facilities in the same way other student groups may use them.[1]

---

[1] The facilities are not special facilities for religion or any other purpose, nor does the use of them interfere with the functioning of the school.

The characterization of the case is important because of the variety of cases dealing with the religious clauses in the federal constitution. There have been two reoccurring categories of cases:[2] One category is cases involving religious activities in elementary and secondary schools. Another line of cases construes the propriety of states financially aiding sectarian schools. Both lines of cases are inapposite to this lawsuit, except insofar as statements by the court are clearly of a general nature. The Court of Appeals of the District of Columbia Circuit said in O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979):

> Appellants' reliance on cases treating elementary and secondary schools is inappropriate. Because of their central and delicate role in American life, and because of the unique susceptibility of their

---

[2] See Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) at 722, where the court describes these lines of cases.

> captive audience, children, to coercion, the public schools have a special insulation from religious ceremony. Different considerations apply to colleges and universities, where the likelihood of coercion is less, and to other forums where free exercise values demand accommodation of religious belief.

613 F.2d at 936 (footnote omitted). The Court also recognized this differentiation in Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976).

Justice Douglas recognized that adults are involved in cases dealing with the college or university community. In Healy v. James, 408 U.S. 169 (1972), in Justice Douglas' concurring opinion, he said:

> Students--who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age--are adults who are members of the college or university community
> . . . .
> . . . .
> . . . Students as well as faculty are entitled to credentials in their search for truth. If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change,

> students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.

408 U.S. at 197.

Although Justice Douglas' remarks were made in the setting of a group objecting to political opposition, the statements are just as applicable to a situation where students are searching for religious truth. In fact, an argument can be made that there is a greater right to this since free exercise of religion is specifically protected by the Constitution while political speech simply falls under free speech and association rights. In any event, this case involves adults exercising constitutionally-protected rights in a setting which has traditionally been a forum of communication dedicated to the search for knowledge.

B. The Peculiar Nature of a University Should Be Considered

In Healy v. James, supra, the Court said:

> The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

408 U.S. at 180-181. The description of schools as a "marketplace of ideas" has also been applied to the high school context. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). Yet, it is apparent that in a university setting there is wider latitude for communication of ideas. This is true for a number of reasons: Universities are dealing with adults who are there voluntarily rather than students who are required to be there by state law. Persons attending a university are also in a position to evaluate the ideas taught them as opposed to being

indoctrinated. The court of appeals recognized this and properly distinguished other situations.

Universities also traditionally perform more functions on campuses than simple teaching of courses. Indeed, one of the primary functions of a university is to challenge the students in all aspects of their lives to prepare them for their role in society.[3] To extricate all religious elements from those challenges is to ignore the role of universities in our society.

A university is also peculiar in another way: Many universities across the United States exist as communities in and

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[3] In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court accepted the proposition that " . . . education prepares individuals to be self-reliant and self-sufficient participants in society." 406 U.S. at 221. Although this was in the context of secondary education, it also applies to universities.

of themselves. As the amicus brief for the Center For Law And Religious Freedom Of The Christian Legal Society points out, a university is the equivalent of a company town for its students.[4] Students at universities are often far from home and do not commingle in the town where the university is located. Furthermore, university students, almost by definition, are very busy individuals. Many hold jobs and go to school at the same time. Thus, to acquire university students to go off campus to exercise their constitutional rights is far more of an infringement than might otherwise appear.

The ability of students to meet off campus does not diminish the infringement of first amendment rights. This Honorable Court has stated in Healy v. James, supra:

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[4] Amicus curiae brief of the Center For Law And Religious Freedom Of Christian Legal Society, at pp. 6 and 7.

> We are not free to disregard the practical realities. MR. JUSTICE STEWART has made the salient point: "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

408 U.S. at 183. Thus, the court held that the fact students could meet off campus did not remove the constitutional violation.

Universities are a place of communication of ideas. The Court in Tinker v. Des Moines School Dist., supra, quoted Justice Brennan's statement from Keyishian v. Board of Regents, 385 U.S. 589, at 603, where he stated:

> "The vigilent protection of constitutional freedoms is nowhere more vital than in the community of American Schools." Shelton v. Tucker, [346 U.S. 479] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

393 U.S. 503, at 512.

In a university setting, this applies even more strongly than in the context of a high school demonstration against the Vietnam war. Justice Brennan later made similar statements concerning religious liberty in McDaniel v. Paty, 435 U.S. 618 (1978). In his concurring opinion, Justice Brennan said:

> Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations, and that each sect is entitled to "flourish according to the zeal of its adherents and the appeal of its dogma." Accordingly, religious ideas, no less than any other, may be the subject of debate which is "uninhibited, robust, and wide-open . . . ." Government may not interfere with efforts to proselyte or worship in public places. It may not tax the dissemination of religious ideas. It may not seek to shield its citizens from those who would solicit them with their religious beliefs.
>
> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. The mere fact that a

> purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.

435 U.S. at 640 (citations and footnotes omitted, emphasis added).

C. First Amendment Rights Violated in This Case

The rights of free exercise of religion, freedom of association, and freedom of speech are clearly violated by the university policy. The UMKC has required students to move off campus, which is the equivalent of outlawing the student group. This removes any viability for existence of a student group because of denying them contact with other students.

In Healy v. James, supra, the Court held that the refusal of a university to recognize a local student group of the SDS would violate their right to freedom of

association. The First Circuit Court of Appeals relied on the Healy v. James, supra, case in Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974). The court said:

> It is true that there [in Healy] the university had refused to recognize the campus organization altogether rather than denying it the use of campus facilities for certain activities. But the Court's analysis in Healy focused not on the technical point of recognition or nonrecognition, but on the practicalities of human interaction. While the Court concluded that the SDS members' right to further their personal beliefs had been impermissibly burdened by nonrecognition, this conclusion stemmed from a finding that the "primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes."

509 F.2d at 658 and 659. The court specifically held that the denial of use of campus facilities equaled abridgement of the right to associate.

The respondent students are entitled to even greater protection than the SDS in Healy v. James, supra, and the gay students in Gay Students Organization of University of New Hampshire v. Bonner. Not only do the students have associational rights, but also the specifically protected right to free exercise of religion. The two are very much entwined.[5] The beliefs of the students are sincerely held. These beliefs dictate associating.[6]

To characterize the present policy of a university as an adequate accommodation

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[5] In Keegan v. University of Delaware, supra, the Delaware court said "Religion, at least in part, is historically a communal exercise." 349 A.2d at 17. Tribe, supra, says at § 14-1, p. 812: " . . . much of religious life is inherently associational . . ." This is also clear from the tenets of the particular religion involved.

[6] See the amicus curiae brief of the Center For Law And Religious Freedom Of The Christian Legal Society, pp. 4-5.

within the constitutional definition is wrong. The policy does not accommodate, but instead denies religion the opportunity to be a viable force. The policy forces religion off campus or underground rather than neutrally accommodating it. The cases indicate that free exercise cannot be denied by hiding behind the establishment clause.[7] For example, Justice Brennan concurring in McDaniel v. Paty, supra, said:

> On the other hand, the Court's decisions have indicated that the limits of permissible governmental action with respect to religion

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[7] See Abington School Dist. V. Schempp, supra, and Everson v. Board of Education, supra. Tribe, supra, also makes this point in discussing Sherbert v. Verner, supra. Tribe, supra, says at § 14-10, p. 852: " . . . There would, of course, be no cases of impermissible failure to accommodate religion if government's refusal to do so could automatically be justified simply by invoking the desirability, given the establishment clause, of complete governmental inattention to religious circumstances."

> under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause.

435 U.S. at 638.

D. Free Use of the Facilities Would Not Constitute Establishment of Religion

Given the serious nature of the violation of the students First Amendment rights, why would the university adopt this new policy? The sole rationale used was the establishment clause.[8] This is not a valid rationale for a number of reasons.

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[8] Petitioners also argue that Missouri has a "compelling state interest" for the violation of student rights. However, this ignores the seriousness of the infraction of federal constitutional rights. The premise behind the Bill of Rights is that a state cannot abridge those rights simply by having a different state policy. Furthermore, reduced to its essence, petitioners state interest argument is simply the establishment argument in another guise.

A neutral university policy would not establish religion. Other student groups are allowed use of the facilities, yet nobody would say the university officially supports the Young Socialist Alliance. Nor does the university support the Jewish College Students. By its very nature, a university accommodates a variety of perspectives. This is so widely recognized by the public that to argue establishment from mere use of facilities defies truth.

The use of facilities would not interfere with the smooth functioning of the university, nor disrupt the order needed in a university setting. The students are not seeking special facilities at high use times. Nor are the students requesting their own facilities. Instead, the students simply ask to be treated as other student groups. The university cannot assert interference with its functioning when it allows other groups to use facilities.

Petitioner tries to bolster their argument of establishment by urging that the students desire the "university imprimatur" of their activities.[9] This mischaracterizes what is involved here. The students do not seek university support; they simply ask that the university not deny them their rights by forcing them off the campus. The students recognize, for the very reasons discussed above, that allowing use of facilities would not mean that the university support their purpose. Therefore, since there is no logical reason why they would be forced off campus, it appears to other students that something else is wrong with them.

In Keegan v. University of Delaware, 349 A.2d 14 (Del. 1975), the court held that allowing students to meet in a commons

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[9] Petitioner's brief at p. 17.

area for mass would not violate the establishment clause of the Constitution. The court stated:

> University policy without the worship ban could be neutral towards religion and could have the primary effect of advancing education by allowing students to meet together in the commons room of their dormitory to exchange ideas and share mutual interests.

349 A.2d at 16. The Delaware court thus recognized that a university campus is an area where education encompasses religion in its search for truth.

The Delaware court also relied on the many indications by the Supreme Court that the proper role for the state is that of neutrality rather than either inhibiting or advancing religion.[10]

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[10] The list of Supreme Court cases advocating state neutrality is long. See for example, Abington School Dist. v. Schempp, 374 U.S. 203 (1963): "The wholesome 'neutrality' of which this Court's cases speak . . . ." 374 U.S. at 222. Everson v. Board of Education, 330 U.S. 1 (1947): "State power is no more to be used so as to

Amicus herein concurs in the discussion of the neutral role of the state in the briefs filed by respondents and other amicae.[11]

(footnote 10 continued)

handicap religions than it is to favor them." 330 U.S. 18. Zorach v. Clauson, 343 U.S. 306 (1952): "But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." 343 U.S. at 14. Committee for Public Education v. Nyquist, supra: "A proper respect for both the free exercise and establishment clauses compels the state to pursue a course of neutrality towards religion." 413 U.S. at 792. Roemer v. Maryland Public Works Board, supra: "Neutrality is what is required."

[11]While the Supreme Court has required neutrality for purposes of the establishment clause, the "wholesome neutrality" may dictate more for the free exercise clause. Thus, the state must have a strong reason to infringe upon this. Wisconsin v. Yoder, supra: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. The state may even be required to take affirmative action to ensure a person's right to free exercise of religion. Sherbert v. Verner, 374 U.S. 398 (1963). See, also, Tribe, supra, at § 14-4.

Petitioners recognize the weakness of arguing establishment from mere use of facilities and, therefore, try to bring in tax considerations. This is error. Most of the tax cases are related to financial support and do not involve corresponding abridgement of First Amendment rights. Tilton was such a case. Furthermore, this ignores the type of use requested. The students are not asking for new buildings or specially dedicated buildings. The university allows a wide range of groups to use its facilities. Most universities do not have maximum use of their facilities especially in the evenings. The tax base is not affected by allowing idle buildings to be used for student activities. Could a state refuse a certain class of persons fundamental rights simply because state taxes were involved in some way? The taxation power permeates so many activities

that this would allow rampant denial of constitutionally protected rights.

E. The Present Policy of the University Will Cause Establishment of Religion and Entanglement Between State and Religion

There is a violation of the establishment clause from the university's present policy. In Abington School Dist. v. Schempp, supra, the Supreme Court held the establishment clause is violated when there is either an advancement or inhibition of religion.[12] In this situation, the banning of the university's religious groups from campus is clearly an inhibition of religion. The state is required to be neutral and not inhibit religion as this policy does.

The present university policy has the potential for excessive entanglement

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[12] 374 U.S. at 222.

between the state and religion. The doctrine of excessive entanglement was first articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I). Since then, the doctrine has been used primarily in the area of financial aid to sectarian schools.[13] However, the dangers from excessive entanglement are just as applicable to this case. The excessive governmental entanglement with religion is what "truly threatens private liberty and public order."[14] As Justice Stevens stated in Roemer v. Maryland Public Works Board, supra, dissenting, "The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith." 426 U.S. at 775. In Walz v. Tax

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[13] See Tribe, supra, at § 14-12.

[14] Tribe, supra, at p. 689.

Commission, 397 U.S. 664 (1970), the Court was concerned with avoiding both governmental evaluations of religious practices and the entanglement of "government in difficult classifications of what is or is not religious."[15] Another danger articulated in Lemon I, supra, is the danger of government directing the religion.[16] All of these dangers exist in the present case.

The university, under the present policy, is entangled with religion. The most obvious example is the defining of what is or is not religious for the purpose of limiting the use of facilities. This Honorable Court has emphasized the need for government to stay free of matters of

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[15] Tribe, supra, at 869, quoting from Walz v. Tax Commission, supra.

[16] Lemon I, supra, 403 U.S. at 620.

religious doctrines.[17] Yet, this policy requires deciding what is religious. Amicus herein suggests that the definition of what is religious could lead to the very dangers articulated by this Court. For example, is transcendental meditation religious or not? The UMKC currently allows the Jewish college students to meet according to the memorandum cited in footnote 1 of the court of appeals opinion. Are they not religious? What about socialist/communist groups who advocate "faith" in their system? A series of this type of question will have to be answered by a university administration, if the present policy stands. The university should not define and classify what is or is not religious.[18]

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[17] See Presbyterian Church v. Hull Presbyterian Church, 393 U.S. 440 (1969) at 449.

[18] Walz v. Tax Commission, 397 U.S. 664 (1970).

Petitioners suggest that the university is capable or required to classify and that no error would result from this. Yet, petitioners themselves seriously misunderstand the nature of the beliefs of the students in this case. Petitioners say that the students are not required to evangelize and spread their message in the same way that members of the Hare Krishna sect must.[19] This position ignores a basic tenet of the religion of the students, the great commission stated in the Holy Bible: Matthew 28:19-20 and Mark 16:15. If petitioners do not understand the religion of the students in such a fundamental manner, how can others be expected to make careful and difficult decisions concerning what is or is not religious?

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[19] Petitioners' brief at p. 33, footnote 11.

The neutral policy of allowing all student groups use of facilities without discrimination or classification is best. Establishment problems would be avoided by neutrality. Entanglement problems would be avoided for the same reason because no classification or definition would be involved.

F. The Effect of This Honorable Court's Opinion

A large number of universities and colleges across the United States make an affirmative effort to be neutral toward religion by accommodating it without establishing it. Institutions across the nation recognize that religion has played an integral part in our heritage, in our culture, and in our academic life. Religion is involved in a myriad of disciplines. Such disciplines as philosophy, history, psychology, art and literature all reflect the religious background of this

nation and, indeed, humanity. Furthermore, all students have been exposed to religion and either are involved in some form of religion or have considered it prior to attending a university.

Universities and colleges recognize this and attempt to meet the needs of the students as they come to the universities by providing assistance for religious groups without advocating them. Although a university cannot meet religious needs directly, it should be free to allow religious groups to do this. Thus, many universities will give student religious groups the same rights and privileges and hold them accountable in the same way as other student groups organized for other purposes. The university will ensure that no coercion is involved between other students and members of the student religious groups, but the university will not discriminate against the groups.

These practices of colleges and universities across the nation should not have to be amended. Public universities should not have to push all religious groups off campus. A student should not be forced to shed his beliefs for four years while attending a public university, or be required to go to a private college. In view of the prohibitive cost for many people attending private institutions, there would really be no choice at all. Since most students attend public universities, the impact would be on the majority of students. This would effectively preclude many students from participating and exercising their constitutional rights to freedom of religion.

Not only would this deny the student their rights to freedom of exercising their religion, but also preclude the university from relating to this aspect of the student. Universities would also be forced to

carefully evaluate their own functions such as prayers before banquets, baccalaureate exercises and other things to ensure compliance with the decision. This would lead to much more entanglement than could ever be found in a neutral policy of free use of the facilities.

If states and universities are allowed to dictate when and how First Amendment rights may be exercised, the results are frightening. Indeed, petitioners state in their brief:

> If this Court does find an impermissible establishment in permitting such usage of university facilities, Petitioner would expect no attempt at surreptitious worship by Respondents.

Petitioners brief at p. 21. No attempt at surreptitious worship! Does this mean no prayers before eating in university diners? How far may the university go in deciding what they do not like and selectively forbidding it? Amicus respectfully submits

the purpose of the United States Constitution is to protect the rights of the people "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[20]

IV.

CONCLUSION

The unique place of a university in our society mandates a policy providing for free exercise of religion. A university is a forum of communication and open pursuit of knowledge. Students at a university are entitled to exercise religion on the campus without doing so undercover or being forced off the campus.

The well-reasoned opinion of the court of appeals should be affirmed. The law

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[20] 408 U.S. at 183.

prescribes neutral accommodation of religion and that adult students be free to exercise their First Amendment rights. The university should be compelled to permit use of the facilities by student religious groups on the same basis as other student groups.

Respectfully submitted this ___ day of ___, 1981.

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MOTION FILED
APR 30 1981

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

No. 80-689

GARY E. WIDMAR, ET AL.,
Petitioners

—against—

CLARK VINCENT, ET AL.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

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FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Baptist Joint Committee on Public Affairs respectfully moves this Court, pursuant to Rule 36.3 of its Rules, for leave to file the accompanying brief *amicus curiae* in support of respondents in *Widmar, et al.* v. *Vincent, et al.*, No. 80–689.

The consent of the parties to the filing of the attached brief has been sought by the moving party. While the respondents gave their consent, petitioners, as a matter of policy, withheld their consent. *Amicus*, accordingly, proceeds under Rule 36.3.

The Baptist Joint Committee on Public Affairs is composed of representatives elected by eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive Na-

tional Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention.

The Committee, in part, seeks to apply the traditional Baptist concerns for religious liberty and proper church-state relations to public affairs. It is the position of *amicus* that important elements of both of the religion clauses of the First Amendment are at risk in the case at bar and that Baptist insights will not be presented to the Court unless this brief *amicus curiae* is considered by this Court.

Therefore, *amicus* prays this Court grant this motion and consider its accompanying brief which gives the bases and arguments for its support of respondents' position.

Respectfully submitted,

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FOR THE EIGHTH CIRCUIT

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Baptist Joint Committee on Public Affairs (BJCPA) consists of representatives elected by each of eight cooperating Baptist national bodies in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members who evidence a direct interest in church-state relations. One of the mandates of the BJCPA is to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action." Among Baptists, religious liberty is a fundamental and sacred principle.

Religious liberty is also a fundamental legal right protected by the First and Fourteenth Amendments to the Constitution of the United States. The BJCPA and Baptists generally have long held that a strict separation of church and state is required by the First Amendment. The BJCPA believes in a strict construction of the limits placed on the state by that Amendment. We have supported this Court's establishment decisions which have denied the state the power to support a religion, to define a church's religious mission, to promote or denigrate religious beliefs, or to become excessively entangled with religion. Our support has included filing several *amicus* briefs which were in agreement with this Court's subsequent decisions. We decry attempts by the state to control religious actions absent a compelling state interest which cannot otherwise be served. We are alarmed by state action in the case at bar which, in the opinion of *amicus*, discriminates against an organization *because* it is religious and bases that discrimination on a clearly erroneous reading of the establishment clause.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution involved in the case at bar are the First and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

The decisions below raise three major questions which *amicus* will address in this brief: (1) Is regulation 4.0314.0107, adopted by the Board of Curators of the University of Missouri, Kansas City campus (UMKC), required by the establishment clause of the First Amendment or does that regulation itself fail to conform to the test established by this Court to determine when state action has infringed the establishment clause? (2) Is regulation 4.0314.0107 an affront to the free exercise clause of the First Amendment? (3) Assuming, *arguendo*, that if respondents' on-campus religious activities were not regulated by the state there would be minor elements of establishment present, do the free exercise and free speech

rights of the respondents overbalance the elements of establishment?

STATEMENT OF THE CASE

The facts of the case are well presented in respondents' brief and need not be elaborated here. However, it is important to note that Cornerstone, of which respondents are student members, is an organization of Christian students which is, and for at least four years has been, an officially recognized student organization on the UMKC campus. It has a nucleus of about twenty students who bring speakers to the campus and conduct on-campus meetings and events which have been attended by as many as 125 students.

According to the court below, from 1973 until 1977 Cornerstone sought and obtained permission to use University facilities for its weekly meetings and events. In 1977 this use of facilities was terminated on the grounds that regulation 4.0314.0107, which had been adopted by the Board of Curators of UMKC in 1972, forbade the use of campus facilities "for purposes of religious worship or religious teaching by either student or nonstudent groups." The University later refused a request by Cornerstone that permission be given to hold small group Bible studies on the University lawn.

Eleven student members of Cornerstone initiated this action. UMKC's motion for summary judgment was granted by the United States District Court for the Western District of Missouri. The United States Court of Appeals for the Eighth Circuit reversed and remanded.

SUMMARY OF ARGUMENT

The argument may be briefly summarized as follows:

1. The First Amendment does not prohibit all kinds of religious activities on a public university campus, and the action by the Board of Curators of UMKC to ban the activities of Cornerstone on establishment clause grounds is, in itself, an affront to the establishment clause.

2. The very nature of a university as an educational entity and as a structured society for adult students requires that there be freedom of ideas and freedom of association.

3. The state university campus is a public place in a legal sense and certain religious activities may not be excluded.

4. The actions of the Board of Curators in issuing regulation 4.0314.0107 constitute state action which affronts the free exercise clause in the light of the tests established by this Court.

5. The case at bar exposes some of the tensions which exist between the religion clauses of the First Amendment and thus requires a balancing of constitutional rights and limitations.

ARGUMENT

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, is a limitation on the powers of the government and may not be read as a limitation on the rights of the people. Thus the establishment clause forbids direct or indirect actions by government which establish a religion according to the tests enumerated by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) at 612, 613. But the establishment clause was not intended, and must not be read, to give to the state the power to use that clause to limit the religious liberty of the people. In the case at bar the Board of Curators of UMKC has read the limits on government found in the establishment clause as bases for actions which limit the religious rights of students. In doing so the Board misused the establishment clause.

It is true that in some instances the state may limit or proscribe certain religious activities—i.e. the free exercise of religion—of individuals and groups, *see Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), but the state may not bootstrap on its legitimate free exercise powers to achieve an unconstitutional power *over* religion.

Amicus argues below that the state has misread, misapplied, and misused the First Amendment in this case.

1. The action by the Board of Curators, as agents of the state, to ban the on-campus religious worship and religious teaching by Cornerstone on establishment grounds is, in itself, an affront to the establishment clause.

Petitioners have argued in essence that they are compelled by the establishment clause of the First Amendment to ban religious worship and/or religious teaching from the campus of UMKC. This is legally not correct and is historically not in keeping with the precepts of some of those who were instrumental in securing the addition of the First Amendment to the Constitution. For example, at Thomas Jefferson's suggestion, the regulations of the University of Virginia provided that

> Should the religious sects of this State, or any of them, according to the invitation held out to them, establish *within*, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour.* (emphasis added).

Jefferson, though he strongly opposed the use of public funds to support religion and religious activities, saw no conflict with the establishment clause if religious groups made provisions for instruction in their religious views or for religious worship "within, or adjacent to, the precincts of the University."

This Court enumerated its tests for determining if state action conforms to the establishment clause in *Lemon*, 403 U.S. at 612, 613:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect

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* Chapter II, §1 of the Regulations of the University of October 4, 1824, quoted by Justice Reed in his dissent in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) at 246.

> must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion." (citations omitted).

There is a rebuttable presumption that state actions are a reflection of a secular purpose. It is the contention of *amicus* that the purpose of the Board of Curators in enforcing regulation 4.0314.0107 was to prohibit the student members of Cornerstone from exercising important parts of their religious liberty. Even if the Board's issuing of the regulation appeared on its face to have a secular purpose, it does not follow logically that the unconstitutional purpose of the Board in enforcing regulation 4.0314.0107 is cured by asserting a secular purpose for the issuing of that regulation. *Amicus*, therefore, asserts that the enforcement action by the Board fails the first establishment test.

The principal or primary effect of regulation 4.0314.0107 on its face and in its application is the inhibition of religion. The regulation results in hostility of the state toward religion. The neutrality toward religion which this Court has held is required by the First Amendment was ignored or defied by the Board of Curators in putting the regulation on the books and then, after a period of time, enforcing that regulation. The argument raised by the Board that the absence of such a regulation would constitute state action advancing religion is without merit. Restraint from action in this case would be well within the required neutrality of the state toward religion.

Finally, if the regulation restricting religious worship and religious activity is to be enforced, the state must be committed to a program of continuous monitoring of any activities of Cornerstone or of any other religious group which might be allowed on campus. Even though prayers are permitted at some University functions without, it is assumed, violating the establishment clause, *see* UMKC regulation 4.0314.0107, the state would have to monitor religious groups' activities and determine when a prayer ceases to be permissible and becomes impermissible worship or when Bible reading becomes religious teaching. This would be a classic example of the degree of entangle-

ment of government with religion which this Court decried in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) at 674.

It is the thrust of case law that state action which directly or indirectly financially supports religious institutions or programs or which favors or promotes religion is contrary to the establishment clause. Such actions are not at issue here. *Amicus* submits that the state has not lived up to the standards required by this Court's interpretation of the establishment clause.

2. The nature of a university and of student life in a university implies the presence of on-campus religious activities.

If a public university is to be true to its nature—genuinely pluralistic, diverse, free, and open to intellectual inquiry—it logically follows that religion has a proper place in the curriculum and in the exchange of ideas that make for a full education. As this Court has pointed out, the American college classroom and the college campus are peculiarly the "marketplace of ideas." *Healy* v. *James*, 408 U.S. 169 (1972) at 180. That marketplace of ideas must include ideas concerning religion as well as ideas concerning irreligion. Under the religion clauses as well as the free association and free speech clauses of the First Amendment, the state is forbidden to set arbitrary limits on the content of speech or on who can associate with whom when—and perhaps if—the content of speech or the reason for association is religious. The state is not devoid of powers in this area, but its powers are circumscribed.

> . . . the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. *Healy*, 408 U.S. at 180.

It is true that some of the public religious worship or teachings of a group such as Cornerstone may be offensive to some. However,

> . . . a function of free speech under our system of government is to invite dispute. It may indeed

> best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not an absolute . . . , is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) at 4.

There has been no allegation that Cornerstone's activities have presented a clear and present danger of a serious substantive evil.

This Court has pointed out that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479 (1960) at 487. Also,

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) at 506.

This Court in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), *Hunt* v. *McNair*, 413 U.S. 734 (1973), and *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976), has made distinctions between elementary and secondary schools and post-secondary schools. While *amicus* has not always agreed with these distinctions, they exist and this Court has held that adult students are different from students in elementary and secondary schools. If, as in *Tinker*, this Court has held that the constitutional rights of speech and expression do not stop at the gate of an elementary or secondary school, it must be assumed that rights of at least this magnitude are available to university students. The Board of Curators of UMKC does not seem to agree.

The nature of a university as a marketplace of ideas and of a university community would, in itself, imply the presence and activities of groups such as Cornerstone. The decisions of this Court make it imperative that activities such as those carried on by Cornerstone be available to all students.

3. As a legally public place, a state university may not exclude certain religious activities.

Public property is, by definition, a public place. A public university, such as UMKC, may make some restrictions as to access to and use of facilities and grounds, but when First Amendment rights are involved the nature and scope of those restrictions are severely circumscribed.

> In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with the words of Mr. Justice Roberts that "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (citations omitted). *Kunz* v. *New York*, 340 U.S. 290 (1951) at 293. *See also Henry* v. *Rock Hill*, 376 U.S. 776 (1964), and, on rights of unpopular religious utterances in public parks, *Sellers* v. *Johnson*, 163 F.2d 877 (C.A.8 1947), *cert. denied*, 332 U.S. 851 (1948).

If public streets and parks must be open for such activities, then so, too, should the buildings and grounds of public universities be open to students and recognized student organizations for "purposes of assembly, communicating thoughts between citizens, and discussing public questions" when it is taken into consideration that the assemblying, communicating and discussing deal with constitutionally protected religious questions.

4. The issuing of regulation 4.0314.0107 was an unconstitutional state action under the free exercise tests established by this Court.

In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) at 307, it was asserted that "The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." This is the crux of the problem with regulation 4.0314.0107. The free exercise of religion of a segment of the student body at UMKC has been denied and the right of that segment to communicate information about its religious beliefs has been abridged.

In *Wisconsin* v. *Yoder*, *supra*, tests were given for determining whether state action unconstitutionally limits the free exercise of religion guaranteed by the First Amendment: (1) The court must determine whether or not a legitimate religious belief is held and whether the activity affected by state action is pervasively religious. (2) The court must inquire as to whether the state action places a burden or inhibition on free exercise rights. (3) Assuming an affirmative to these two, the court must decide if the burden is justified by a compelling state interest which cannot be served by less restrictive means.

The facts in the case at bar clearly reveal that Cornerstone is a recognized student religious organization. Its beliefs appear to be legitimately held. No testimony has been offered to the contrary. Similarly, there is no doubt that the Board of Curators of UMKC in issuing and enforcing regulation 4.0314.0107 not only burdened and inhibited free exercise rights but also specifically proscribed the exercise of some of the most important of those rights.

Having, hereby, established that free exercise rights have been violated, we must apply the third prong of the test: Does the state have a compelling or paramount interest which requires or permits limiting the free exercise of religion by the student members of Cornerstone because said interest cannot be served by less restrictive means? The record in this case does not indicate that the state has even attempted to demonstrate a compelling interest in this limitation of the free exercise of religion except to assert that it was compelled to this limitation by the establishment clause. Such an assertion is a *non sequitur* and does

not take into account the primacy given by this Court to First Amendment rights generally and, for present purposes, the free exercise clause particularly.

> [T]he usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. *Thomas* v. *Collins*, 323 U.S. 516 (1945) at 529, 530, *reh. denied*, 323 U.S. 819 (1945).
>
> The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. *Abington* v. *Schempp*, 374 U.S. 203 (1963) at 222, 223.

The student members of Cornerstone have experienced the coercive effect of the enactment and enforcement of regulation 4.0314.0107 on the practice of their religion. UMKC has not demonstrated a compelling interest in prohibiting on-campus religious worship or religious teaching by the students and has made no attempt to show that the regulation was the least restrictive way of serving any such compelling interest. The state has not carried its burden of proof. The action of issuing and enforcing the regulation is clearly unconstitutional.

5. The tensions between the religion clauses of the First Amendment may require a balancing of constitutional rights and limitations.

The Court in *Walz* v. *Tax Commission*, 397 U.S. at 669, spoke of the tensions which exist between the religion causes of the First Amendment and stated:

> The general principle deducible from the First Amendment and all that has been said by the

> Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Amicus submits that the Board of Curators of UMKC, in the absence of regulation 4.0314.0107, would not be sponsoring religion and further submits that the Board, in enforcing the regulation, is certainly interfering with the free exercise of religion by the student members of Cornerstone.

Though *amicus* denies that the Board of Curators acting under the establishment clause was compelled to issue regulation 4.0314.0107, even if it concedes, *arguendo*, that the absence of that regulation could be read as having *an* effect, as opposed to *the primary effect*, of establishing a religion, *amicus* asserts that the "play in the joints" makes it necessary to balance the students' free exercise, free association, and free speech rights against such an infringement of the establishment clause. In the case at bar the balance is clearly in the favor of student rights as against the assumed duty of the Board of Curators.

CONCLUSIONS

Amicus clings to the traditional Baptist firm support of the constitutional requirement of the separation of church and state, and *amicus* holds that this is not the issue in the case at bar. The Board of Curators has not disestablished religion by its action but rather has gone contrary to all the establishment tests set up by this Court. The financial support, promotion, preferment, etc. of religion, forbidden by the Constitution—and forbidden by Baptist concepts of religious liberty—are not at issue here. Interference with the free exercise of religion, free association, and free speech are at issue. For these reasons, *amicus* respectfully requests that the actions of the Board of Curators of UMKC

in establishing and enforcing regulation 4.0314.0107 be declared unconstitutional.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, et al.,
Petitioners,

vs.

CLARK VINCENT, et al.,
Respondents.

MOTION OF BIBLE STUDY,
A Student Organization at the University of Missouri at St. Louis,
FOR LEAVE TO FILE BRIEF
AMICUS CURIAE
and
BRIEF IN SUPPORT OF RESPONDENTS

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May 29, 1981

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ISSUE PRESENTED

Whether the University of Missouri violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by denying student organizations the use of University facilities for religious teaching and worship when it provides facilities to student organizations for all other kinds of expression.

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No. 80-689

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MOTION OF BIBLE STUDY,
A Student Organization at the University of Missouri at St. Louis,
FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

Comes now BIBLE STUDY, a recognized student organization of the University of Missouri at St. Louis, and moves, pursuant to Supreme Court Rule 42, for leave to file the accompanying brief Amicus Curiae in support of Respondents.

Counsel for Amicus Curiae has obtained the consent of counsel for Respondents to file this brief. However, counsel for Petitioners has advised the undersigned counsel for Amicus Curiae that "it is the policy of our office

[Office of General Counsel, University of Missouri] not to consent to the filing of Amicus briefs in cases to which the University of Missouri is a party." Therefore, the Court's permission is hereby requested and required for the filing of the accompanying brief.

Bible Study, by leave of the Court of Appeals, filed a brief and a reply brief in the Court of Appeals for the Eighth Circuit's consideration of this matter. The Supreme Court of the United States granted Bible Study leave to file a brief Amicus Curiae in opposition to the University's Petition for Certiorari by Order dated February 23, 1981.

Bible Study is an officially recognized student organization at the University of Missouri at St. Louis. It was organized approximately five years ago. Although it is a religiously oriented student organization located on a University of Missouri campus, in contrast to Cornerstone, its activities consist almost entirely of reading the Bible and discussing interpretations of the chapters studied at each meeting. Bible Study is not affiliated with any particular religious faith nor does it discriminate against others because their particular religious faith or lack of a relgious faith. Their meetings focus on an analysis and interpretation of Bible passages in an effort to give meaning and direction to the lives of the participants.

After its request for meeting space was denied in 1978, Bible Study made repeated requests of the University and its Board of Curators for use of meeting rooms. As was their policy with respect to Cornerstone, the University denied meeting space for the regular meetings of Bible Study on the determination that a grant of space would violate the University's regulation No. 4.0314.0107.

On August 4, 1981, the Court of Appeals for the Eighth Circuit determined that regulation 4.0314.0107 is invalid. Shortly thereafter Bible Study renewed its request for

University facilities for weekly meetings for the academic year commencing in late August of 1980. In spite of the Court of Appeals' ruling invalidating the regulation, this request was denied on the grounds that the constitutionality of the regulation had not been finally determined.

On September 2, 1980, Bible Study advised the Board of Curators and the officers of the University that they were renewing their request for meeting space. They also advised the members of the Board by telegram that if consent for equal access to facilities were not granted, the organization was prepared to seek an injunction against the enforcement of the regulation. The Board of Curators determined that the regulation should be suspended pending final resolution of the issues in this case.

As specified in its Motion for Leave to File Brief in opposition to the Petition for Certiorari, Bible Study is immediately affected by the outcome of this case. It has been and is subject to the University regulation now under challenge by students at the University of Missouri-Kansas City.

Bible Study believes that its interests may not be adequately represented by individually named respondents of the University of Missouri-Kansas City. It therefore respectfully requests leave to file the accompanying Brief in support of Respondents within the appropriate time allowed for filing.

Respectfully submitted,

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May 29, 1981

BRIEF IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

Bible Study is an officially recognized student organization at the St. Louis campus of the University of Missouri. Over the course of the last several years, it has submitted requests for meeting space on campus which have been denied by the University. Bible Study has been advised that the regulation now under consideration by this Court compels denial of its request for meeting accommodations.

Bible Study encourages all interested persons, religious or non-religious, affiliated with a specific faith or not, to attend their weekly sessions to discuss Bible passages. Their meetings traditionally close with a prayer. If the University's onerous regulation is stricken, as sought herein, Bible Study would be free to invite speakers of national prominence to the St. Louis campus to address student groups on religious subjects.

The course of Bible Study's future will be profoundly affected by the outcome of this case. Their ability to maintain access and visibility to those who desire to learn about the Bible, whether for literary, historical, philosophical or religious purposes, will be implicated by this Court's ruling respecting this challenge to the University's prohibition of religious teaching and worshp.

SUMMARY OF ARGUMENT

Through its policy of extending meeting facilities to recognized student organizations, the University has created a public forum. The University has violated the

Fourteenth Amendment and the First Amendment by prohibiting student organizations from engaging in religious teaching and worship within that forum. In addition, their regulation unconditionally restricts expression solely on the basis of its content. It is well recognized that religious expression enjoys the same constitutional status as other expression.

The University has no compelling interest which would justify the restriction it seeks to impose on the First Amendment rights of students. The Establishment Clause does not require the prohibition of religious teaching and worship on campus. Moreover, the Establishment Clause requires the University's policy be rescinded in favor of a policy of neutrality which would accord the students the rights to which they are entitled and which would eliminate the University's entanglement with religion. The Missouri State Constitution does not warrant the restriction which the University has imposed.

ARGUMENT

In its review of the University's prohibition of religious teaching and worship in campus facilities, the Court of Appeals for the Eighth Circuit characterized this case as one which raises the fundamental issues of "freedom of religious expression and equal access to a public forum." *Chess v. Widmar*, 635 F.2d 1310, 1316 (8th Cir. 1980). Bible Study concurs that these basic constitutional principles control this controversy and further concurs with the Court's analysis and its conclusion that "[b]ecause of the burden it imposes on the rights guaranteed . . . by the First and Fourteenth Amendments of the federal Constitution, the regulation is invalid." *Id.* at 1320.

I. THE UNIVERSITY CANNOT ALLOW RECOGNIZED STUDENT ORGANIZATIONS TO MEET ON CAMPUS AND DENY ACCESS TO ONE GROUP SOLELY BECAUSE IT ENGAGES IN RELIGIOUS WORSHIP OR TEACHING.

Consistent with its role as a contemporary institution of higher learning, the University of Missouri has acknowledged the extra-curricular needs of students in its official Bulletin:

> **student activities**
>
> The student activities program is coordinated by the STUDENT ACTIVITIES OFFICE located in the University Center. Through various student organizations, boards and committees, cultural, social, educational and recreational programming is provided. The aim is to make student free time activity, a cooperative aid to academic study.
>
> In all its functions the student activities program encourages self-directed activity. This provides a great opportunity self-realization and individual growth while participating in programming for the entire student population or for a special interest group. The overall goal is to develop social and cultural awareness as well as intellectual curiosity. Students plan events and programs in such a way that they learn while working and find enjoyment at the same time.
>
> In extracurricular affairs, students govern themselves in accordance with the All Student Association (ASA) constitution. The legislative body is the Student Council, a representative group of students elected annually by the student body. The ASA recommends funding and acts as an advocate of student rights.

> Activities provide an excellent opportunity for all students to meet and work with the administration and faculty, as well as local community groups. Social and fiscal responsibility and leadership in our democratic society is a prime requirement for the educated individual. Student activities attempt to provide opportunity in these areas.
>
> Most activities and the ASA offices are housed in the University Center which is dedicated to serving the social, co-curricular and cultural needs of UMKC. Student programs in the University Center, often include lectures, symposia, concerts, discussions, receptions, chess and bridge tournaments, as well as many other special events sponsored by the ASA and its programming division, the University Program Council.

J.A. 37, Supplemental Stip., Exhibit 1.

Similarly, the University's dedication to the full development of students was confirmed in the administration's description of the student activity fee:

> CAMPUS WIDE PROGRAMS—The Intramural Sports Program, Communiversity, the *University News*, the University Program Board, the Cultural and entertainment activities of the University Program Board and the Student Services Commission, all represent programs which have campus-wide appeal and interest. In general, these types of programs span the distance between school council programs and those of ethnic and/or special interest groups. Without this segment of student programming being active and creative, the campus' social, cultural, entertaining, and service needs would go unmet.
>
> SPECIAL INTEREST GROUPS—Just as the University is responsive to the various educational needs of

> society, it must also be responsive to the various ethnic and nonacademic special interest groups within the University. The University has officially recognized over 90 active student organizations, each with its specific area of interest. Ethnic organizations, such as Jewish College Students, United Mexican American Students, and The Afro-American Student Union, focus on the issues and concerns of their particular ethnic heritage. There are political organizations, such as Young Socialist Alliance, Women's Union, Young Democrats, and so forth. Also, there is a broad spectrum of non-ethnic special interest groups such as the Fencing Club and Bridge and Chess Club, the Karate Club, Mortar Board, Omicron Delta Kappa, etc. These groups are formed by students to provide another dimension to the student's life on campus - the extra and co-curricular experience.

J.A. 37, Supplemental Stip., Exhibit 2.

In an effort to meet these "social, cocurricular and cultural needs," the University grants official recognition to student organizations at each campus. A benefit which accompanies official recognition is the use of University buildings and grounds for meetings. J.A. 26, Stip. ¶3.

Pursuant to this University policy, Cornerstone, and other student religious organizations, were granted access to facilities for their regular meetings until 1977. J.A. 26, Stip. ¶7.

The abrupt change in policy as applied to Cornerstone resulted from a review of the organization's activities[1] and

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1. Pursuant to a request from the University, Cornerstone explained that its meetings include the following activities:

1. The offering of prayer;

(Continued on following page)

a University determination that the content of their meetings contravened the Board of Curators' Regulation No. 4.0314.0107. J.A. 26, Stip. ¶7. The regulation provides:

> 4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for

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Footnote continued—

2. The singing of hyms in praise and thanksgiving;
3. The public reading of scripture;
4. The sharing of personal views and experience (in relation to God) by various persons;
5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and
6. An invitation to the interested to meet for a personal discussion.

As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.

Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere. There also is no doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.

There are no collections or solicitations of funds at these meetings, and there are no specific rituals or practices of any particular denomination or sect. J.A. 26, Stipulation of Facts, Exhibit C.

religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

A. The University Is a Public Forum.

The Court of Appeals identified the University's policy of extending meeting privileges to student organizations as one which "created an open forum for the activities of its recognized student groups." *Chess v. Widmar*, 635 F.2d at 1316. In recognizing the University campus as a public forum, the Court of Appeals followed long accepted case law which acknowledges the important role the First Amendment plays in an educational institution. *Papish v. University of Missouri Curators*, 410 U.S. 667 (1973); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). See also, *Spartacus, Etc. v. Board of Trustees of Illinois*, 502 F.Supp. 789 (N.D. Ill. 1980). Granted, the University retains the power to prescribe reasonable restrictions on the time, manner and place of expression within its public forum, but that power "does not lessen or negate its quality as a public forum." *Spartacus, Etc. v. Board of Trustees of Illinois*, 502 F.Supp. at 799.

Amicus recognizes that the primary function and character of a publicly-owned facility may preclude its qualification as a forum appropriate for the exercise of First Amendment freedoms. However, the circumstances which dictated this Court's determination that a jail, *Adderly v. Florida*, 385 U.S. 39 (1966), and a military installation,

Greer v. Spock, 424 U.S. 828 (1976), do not rise to the status of a public forum are not present in this case. The primary function historical use and activities of the University are far more closely aligned with the many facilities which have been recognized as public forums.[2] This conclusion is even more compelling in the case of a public university, such as the University of Missouri, which is committed to developing "social and cultural awareness, as well as an intellectual curiosity," and to providing an environment conducive to self-realization and growth. J.A. 37, Supplemental Stip., Exhibit 2.

B. The University's Regulation Is Unconstitutional Because It Has Been Applied to Deny Meeting Facilities to Selected Organizations Because of the Content of Their Meetings.

Having exercised its option in favor of creating a public forum, the University now must provide access to that forum on an equitable basis. *University of Missouri, Etc. v. Dalton*, 456 F.Supp. 985 (W.D. Mo. 1978); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); *Niemotko v. Maryland*, 340 U.S. 268 (1951). The University's efforts to condition any student organization's access to University buildings and grounds on a pledge that its members will refrain from religious expression defies the basic command of the First Amendment as explained in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972):

> "There is an 'equality of status in the field of ideas,' and the government must afford all points of view an equal opportunity to be heard. Once a forum is opened

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2. See, e.g., *Niemotko v. Maryland*, 340 U.S. 268 (1951) (City Park); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (Municipally-owned Theater); *Hague v. CIO*, 307 U.S. 496 (1939) (City's Streets & Parks).

> up to assembly or speaking by groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone."

See also, *Carey v. Brown,* ..... U.S. ....., 65 L.Ed.2d 263 (1980) and *Cohen v. California,* 403 U.S. 15 (1971).

The fact that all recognized student organizations are prohibited from engaging in religious worship and teaching in university-owned facilities does not cure the regulation's basic constitutional defect for "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison v. Public Serv. Comm'n,* ..... U.S. ....., 65 L.Ed.2d 319, 328 (1980).

Moreover this Court reaffirmed the Constitution's abhorrence of content-based restrictions on speech less than one year ago. *Carey v. Brown,* supra, reminded us all that "the desire to favor one form of speech over all others—is illegitimate." 65 L.Ed.2d at 274.

This Court, on a previous occasion, instructed the University of Missouri, that:

> ". . . the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, . . ." *Papish v. University of Missouri Curators,* supra, at 671.

In the face of this consistent denunciation of "content-based" restrictions the University has imposed an official preference for non-religious speech. It has adopted and enforced a blanket prohibition against any expression

containing religious teaching or worship. Clearly this regulation contravenes the basic constitutional principle on which this case turns, for

> ". . . above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dept. v. Mosley,* 408 U.S. at 92.

The University's constitutionally infirm, content-based restriction has resulted in disparate treatment of similarly situated student organizations. This violates the First and the Fourteenth Amendments.

C. Religious Expression Is Protected by the Speech Clause of the First Amendment.

Petitioners have expressed concern about the appropriate constitutional position of "religious speech" and have argued that "[i]t is still 'speech' and such speech should not be given any greater protection because it happens to be about a religious subject." Petitioner's Brief at 27, 28. Amicus wholeheartedly concurs that religious expression is not entitled to any greater constitutional protection than speech addressing politics, tax reform, abortion, civil rights, or capital punishment. But neither should religious expression be afforded any lesser constitutional protection, as this regulation requires. *NAACP v. Alabama,* 357 U.S. 449 (1958) confirms the equal status which "political, economic, *religious* and cultural matters," enjoy under the First Amendment. Id. at 460. (Emphasis added).

Petitioners contend that the religious content of the expression it seeks to restrict takes it out of the protection of the speech clause. Petitioner's Brief at 27. This Court

has never found that religious expression enjoys a lesser constitutional status than other kinds of expression. On the contrary, this Court's rulings in *Fowler v. Rhode Island*, 345 U.S. 67 (1953) and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), compelled the Court of Appeals to conclude ". . . that religious speech, like other speech, is protected by the First Amendment." *Chess v. Widmar*, 635 F.2d at 1315. See also, *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Other courts throughout the country have recognized the equal status of religious expression in a public forum.[3]

II. NEITHER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT NOR THE MISSOURI CONSTITUTION JUSTIFIES THE UNIVERSITY'S PROHIBITION OF RELIGIOUS TEACHING OR WORSHIP.

University officials have attempted to defend their regulatory abridgement of the students' First and Fourteenth Amendment rights with the argument that religious expression in University facilities would violate the Establishment Clause of the United States Constitution and of the Constitution of the State of Missouri. The Court of Appeals rejected this contention and concluded that the regulation imposed by the University not only was not required by the Establishment Clause, but that the regula-

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3. See, e.g., *International Society for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263, 270 (7th Cir. 1978) (sale of religious literature in Chicago airports); *International Society for Krishna Consciousness, Inc. v. Englehardt*, 425 F.Supp. 176 (W.D. Mo. 1977) (distribution of religious literature at Kansas City International Airport); *Swearson v. Myers*, 455 F.Supp. 88, 91 (D. Kan. 1978) (distribution of literature and solicitation of funds); *Hall v. McNamara*, 456 F.Supp. 245, 246 (N.D. Cal. 1978) (city permit requirements for distribution of literature or solicitation of funds); *International Society for Krishna Consciousness, Inc. v. Walke*, 453 F.Supp. 869 (E.D. Wisc. 1978) (distribution of literature in Milwaukee airport).

tion itself contravened the prohibition against governmental establishment of religion. *Chess v. Widmar*, 635 F.2d at 1317.

In reaching its conclusion, the Court of Appeals applied the test fashioned by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1970).[4] Under this test, the governmental enactment under scrutiny

> ". . . First, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive entanglement with religion." 413 U.S. at 773.

The District Court found, and the Court of Appeals agreed, that permitting Cornerstone to meet on campus would reflect a secular purpose in that it would aid all student groups without regard to religion and that elimination of the distinction among student organizations would completely avoid any government entanglement with religion. *Chess v. Widmar*, 480 F.Supp. 907, 914 (1979), *Chess v. Widmar*, 635 F.2d at 1317. The trial and appellate courts disagreed, however, on the District Court's finding that allowing religious teaching or worship on University campuses would have the primary effect of advancing religion. *Chess v. Widmar*, 635 F.2d at 1317.

The Court of Appeals explained its evaluation of a neutral policy as follows:

> "We cannot agree, however, that such a policy would have the primary effect of advancing religion. Rather,

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4. This Court has consistently applied the three-pronged test to review establishment clause up to and including: *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, reh. denied, 445 U.S. 972 (1980) and *Thomas v. Indiana Employment Security Division Review Board*, 49 U.S.L.W. 4341 (April 7, 1971); *Stone v. Graham*, ... U.S. ....., 66 L.Ed.2d 199 (1980).

it would have the primary effect of advancing the University's admittedly secular purpose—to develop students' 'social and cultural awareness as well as their intellectual curiosity.' It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular. *It would no more commit the University, its Administration or its faculty to religious goals than they are now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, the Young Democrats or the Women's Union.*" Id. (Emphasis added.)

Moreover, Bible Study submits that unless the University concedes that provision of meeting accommodations signifies the institution's support and approval of Gay Lib's advocacy of homosexuality as a way of life and the National Education Association's commitment to collective bargaining, *Gay Lib v. University of Missouri*, supra, *University of Missouri, Etc. v. Dalton*, supra, it cannot maintain that the extension of similar meeting privileges signals sponsorship, support and approval of Cornerstone. Cornerstone does not seek the University's imprimatur, nor its power, prestige and influence. It simply seeks the same degree of neutrality accorded other groups. Cornerstone is constitutionally entitled to no more and no less. *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976).

When Pope John Paul visited the United States, Madalyn Murray O'Hair challenged his use of the National Mall for Mass on the ground that such use would signal government approval and establishment of religion. However, the United States Court of Appeals for the District of Columbia Circuit rejected this rationale. *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979). Noting that the Department of Interior treated all religious and non-religious groups

alike in providing use of the Mall, the court determined that the holding of the scheduled church service

> ". . . implies no more approval for this Church than for any other group using the Mall. The message that it does send to the world is approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion." Id. at 936.

The Court went on to warn against confusing the required neutrality with hostility and concluded that the challenged $128,450 to $178,450 expended by the Park Service for services similar to those expenses incurred with any large gathering on the Mall constituted "accommodation in furtherance of the spirit and purpose of the First Amendment." Id. at 937.

Amicus urges this Court to apply *O'Hair v. Andrus* and, thus, replace the hostility generated by the University's regulation with the neutrality and accommodation to which the students are constitutionally entitled.[5]

Bible Study also submits that the University is incorrect in its contention that providing equal access to University facilities for religious teaching and worship would constitute support of religion. It is well recognized that an absolute "hermetic separation" between government and religion is impossible. *Roemer v. Maryland Public Works Bd.*, supra. Furthermore, as Justice Blackmun observed in *Roemer*: "[R]eligious institutions need not be

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5. As recognized by the Court of Appeals for the Third Circuit, a second challenge to public expenditures occasioned by the Pope's visit, *Gilfallan v. City of Philadelphia*, 637 F.2d 924 at 933 (3rd Cir. 1980), cert. denied, 49 U.S.L.W. 3864 (May 19, 1981), must be distinguished from *O'Hair v. Andrus* and *Chess v. Widmar*, because the plaintiffs in the Philadelphia case agreed that the Pope had a right to use the publicly owned Logan Circle. Their suit challenged only the extraordinary expenditures made to build a special altar to be used only for the Pope's Mass.

guarantined from public benefits that are neutrally available to all." Id. at 746.

The University has contended that provision of the facilities sought by Cornerstone would violate the principle established by this Court in *Tilton v. Richardson*, 403 U.S. 672 (1970). In *Tilton*, this Court reviewed the constitutionality of public funding for the construction of classrooms at church-related colleges. Under the grant, the prohibition against using the facilities constructed with public monies for sectarian activities would expire 20 years after completion. The court recognized that the provision of funds for construction of a building would contribute a substantial value to church-related institutions. Regardless of this recognition, however, the entire program was not invalidated in *Tilton*. Rather, only that portion of the law which permitted restrictions on religious use to expire after 20 years was struck down.

The facts presented by this case are entirely different than those considered by this court in *Tilton*. Therein, a religious body would have gained exclusive control of government-financed buildings. After expiration of the 20 year limitation, the religious organizations would have every right to devote the building exclusively to religious use. Contrary to *Tilton*, Cornerstone is not expecting the University of Missouri to relinquish control of any facility. It simply seeks access equal to that accorded to other groups for purposes of association, communication and study.

A. The Establishment Clause Requires Reversal of the University's Policy.

Not only would a policy granting neutrality to student religious organizations comport with the constitution's requirement of separation, the clause itself requires such a

change in policy. The Court of Appeals determined that the regulation adopted in the name of the Establishment Clause failed the traditional test. Contrary to the University's contention that neutrality would have the primary effect of advancing religion, the Court of Appeals determined that the regulation contravened that Establishment Clause because its primary effect is the inhibition of religion. *Chess v. Widmar*, 635 F.2d at 1317. Such inhibition is the natural consequence of the University's expulsion of religion from the campus. The students' interest in a central place within the arena of communications goes far beyond a matter of convenience. Contrary to the University's argument, the importance of a central, on-campus meeting facility should not be lightly dismissed. *Healy v. James*, 408 U.S. 169 (1972).

Amicus also submits that the University regulation, on its face, requires excessive entanglement with religion in violation of the Establishment Clause. The third-prong of the Establishment Clause test clearly addresses the fact that:

> "The prospect of church and state litigating about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment. . ." *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977).

The record shows that Cornerstone conceded that it would engage in religious teaching and worship, but that does not eliminate the University's difficult task of determining what constitutes "religious" teaching or worship with respect to meeting requests submitted by other organizations. How much monitoring, probing and interpretation will the University's regulation require with organizations who will not concede the religious content of their meetings? Which University official is prepared

to attend open meetings on abortion or capital punishment to determine whether comments addressing the moral aspects of such controversial topics must be censored by the University as a violation of their prohibition of religious teaching or worship? Furthermore, how will she decide, for the regulation itself offers no guidance to the decision-maker who must determine what is "religious"?

In contrast to the necessary entanglement required by the existing regulations, a policy of neutrality would totally eliminate any involvement of the University with religion. If the University were to adopt a policy of neutrality, as requested by Cornerstone, there would be no need for it to be concerned with whether the interaction of Cornerstone on campus advanced or inhibited religious beliefs among students or had no impact either way, for the students would be free and responsible for the exchange of their ideas independent of University censorship. The University could entirely ignore religion. In fact, the University would never have occasion to know the results of interaction among voluntary associations of students.

B. The State Constitution Does Not Compel Infringement of Federal Constitutional Rights.

The University also cites the state's compelling interest in strict separation of church and state, as reflected by the state constitution as justification for enforcement of its regulation. Amicus shares the Court of Appeals' reaction to this argument as set out in Note 7:

> "Moreover it is difficult to believe that the University is as concerned with the strict separation of church and state as it here contends. The regulation at issue specifically states that the ban on the use of University facilities for religious worship or teaching is not to

> be interpreted 'to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities.' Regulation No. 4.0314.0107. This exception creates a greater danger of placing the University's imprimatur on religion than would granting Cornerstone's request for a meeting place." *Chess v. Widmar*, 635 F.2d at 1316.

It should also be noted that the University has allowed construction and use of a chapel on the University's main campus. Regulation No. 4.0314.0108., J.A. 26, Stipulation ¶10. It would appear that the Board of Curators use the Constitution as convenient to support their own personal preferences regarding who will be allowed to pray at the University and what expression will be allowed among recognized student organizations.

Assuming, however, that the University is sincere and correct in its interpretation that the Missouri Constitution requires a higher degree of separation of church and state than the federal establishment clause, Bible Study submits that the state constitutional provision cannot be legitimately used to defeat the students' federal constitutional rights.

The decisions cited by the University which apply the state constitutional provisions requiring separation of church and state do not preclude religious teaching and worship at the University of Missouri. *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1942), and *Berghorn v. Reorganized School District No. 8*, 260 S.W.2d 573 (Mo. 1953), both addressed situations in which formerly sectarian elementary schools were permeated with religious instructors, curricula, and symbols even after they were taken into the state system as public schools. *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974), cert. denied, 419 U.S. 1111 (1975),

addressed the practice of loaning school textbooks to students and teachers in sectarian elementary and secondary schools. *Special Dist. for Education and Training of Handicapped Children v. Wheeler,* 408 S.W.2d 60 (Mo. 1966) concerned the use of public special education teachers who were working in sectarian schools with elementary and secondary students. Therefore, these cases are inapposite and factually distinguishable.

The degree of separation warranted by the susceptibility of impressionable school children simply cannot be applied with respect to the voluntary association of more mature students who are not compelled by law to attend school as were the children in schools examined in the foregoing cases. The Supreme Court of Missouri recognized this important distinction as it upheld state funded tuition grants to students attending private colleges and universities. In *Americans United v. Rogers,* 538 S.W.2d 711 (Mo. 1976), cert. denied, 429 U.S. 1029 the state's highest court explained:

> "In doing so, we take solace in the fact that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: 'Institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background and students.' " Id. at 722.

If the tuition grants, which were based in part on need and which enabled Missouri students to receive support to attend sectarian colleges and universities, do not offend Missouri's interest in separation of church and state,

surely equal access to the University's facilities for the exercise of First Amendment rights will not compromise the state constitution. This is borne out by the experience of the University when meetings of Cornerstone and other student religious organizations were allowed in campus facilities. Their presence threatened neither the state of Missouri nor its constitution.

The University's exception for prayer at public functions, its tolerance of worship at a university chapel and the Missouri Supreme Court's holding in *Americans United v. Rogers*, supra, clearly reveal the fallacy of the argument that the Missouri Constitution requires the impossible, i.e., total and complete elimination of religion from secular life. If the University continues to maintain that the State's interest requires expulsion of religious expression from campus, it must revise its regulation to proscribe prayer at public functions and religious activities in the University's chapel.

CONCLUSION

For the foregoing reasons Amicus Bible Study respectfully urges this Court to affirm the Court of Appeals for the Eighth Circuit's ruling in *Chess v. Widmar*.

Respectfully submitted,

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No. 80-689

In the

Supreme Court of the United States

October Term, 1980

Gary E. Widmar, et al., *Petitioners*

v.

Clark Vincent, et al., *Respondents*

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

Motion for leave to file brief Amicus Curiae and brief Amicus Curiae of Center for Constitutional Studies, National Council of Churches of Christ in the United States, National Institute for Campus Ministry, and United Ministries in Education, Amici Curiae, in Support of the Respondents

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Center for Constitutional Studies was established in 1977 by the University of Notre Dame to serve as a research institute and to engage in selected litigation affecting the integrity and autonomy of independent institutions of higher education, especially church-related colleges or universities. The Advisory Board of this Center is composed of public officials, executives of denominations and religious bodies engaged in education, college administrators, and attorneys knowledgeable in education law. The ecumenical composition of this Board is reflected in the fact that its members are drawn from the following religious groups: Church of Jesus Christ of Latter-Day Saints (Mormon), Jewish, Lutheran, Mennonite, Roman Catholic, Southern Baptist, United Methodist and United Presbyterian.

The National Council of Churches of Christ in the United States of America is the cooperative agency of 32 national Protestant and Eastern Orthodox religious denominations, with an aggregate membership of over 40 million people. The National Council of Churches of Christ is organized exclusively for religious purposes, and it is committed to promoting the application of the law of Christ in every sphere of human relations, including education.

The National Institute for Campus Ministries is an independent interfaith body supporting the ministries of Jews and Christians in higher education through research programs, publications, and programs of continuing education for campus ministers.

United Ministries in Education is a covenant-based ministry created by the national agencies of eight Protestant Churches: American Baptist Churches, Church of the Brethren, Christian Church (Disciples of Christ), the Episcopal Church, the Moravian Church in America, the Presbyterian Church in the United

States, United Church of Christ, and United Presbyterian Church in the U.S.A. This ministry is focused upon services to persons engaged in education as students, teachers, administrators and board members in schools K-12, higher education, and community education.

The Center for Constitutional Studies has conducted a nationwide survey in 1981 of Jewish, Protestant, and Roman Catholic campus ministers serving at public institutions of higher education and is in a position to report to this Court facts concerning the access or denial of access of those ministers to the campuses of state universities similar to the University of Missouri in the instant case. This survey was conducted with the cooperation of the National Institute for Campus Ministry and United Ministries in Education. The work of campus ministers at state campuses will undoubtedly be significantly impacted by the decision of this Court in the instant case, but the interests of these amici cannot reasonably be expected to be articulated or defended by the parties in this case.

In 1978 the Center for Constitutional Studies also conducted a nationwide survey of the presidents of all church-related colleges and universities in this country. Amici are in a position to report to this Court facts concerning the interpretation that various federal officials have placed upon this Court's historical rulings in *Engel v. Vitale,* 370 U.S. 421 (1962) and *Abington School District v. Schempp,* 374 U.S. 203 (1963), as these officials discharge their obligation to implement the federal regulations governing the use of facilities constructed in whole or in part with the financial assistance sustained by this Court in *Tilton v. Richardson,* 403 U.S. 672 (1971). As amici argue in the attached brief, they will undoubtedly be affected by the outcome of the instant litigation, but none of the amici can reasonably expect that their interests will be articulated or defended by the parties in this case.

Amici have tried to obtain consent of both parties to participate in this case. The respondent has granted such consent, but the petitioner is not willing to do so. For the foregoing reasons, amici respectfully move this Court for leave to file the attached brief amicus curiae in support of affirming the judgment of the Court of Appeals.

BRIEF AMICUS CURIAE

I. UNLESS THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED, CONSTITUTIONAL RIGHTS OF STUDENTS ATTENDING PUBLIC INSTITUTIONS OF HIGHER EDUCATION, AND OF CAMPUS MINISTERS SERVING THOSE STUDENTS, WILL BE IMPERMISSIBLY BURDENED.

A. THE GROWTH OF THE STATE'S ROLE IN AMERICAN HIGHER EDUCATION REQUIRES THE STATES TO BE SENSITIVE TO A BROAD SPECTRUM OF HUMAN VALUES, INCLUDING RELIGIOUS VALUES THAT ARE VOLUNTARILY CHOSEN, WHENEVER THE STATES ATTEMPT TO REGULATE AND CONTROL THE EDUCATIONAL EXPERIENCE.

This Court has, on occasion, found it useful to explore the historical background of issues presented to it. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 622-25 (1978) (Opinion of Burger, C. J.); *Walz v. Tax Commission*, 397 U.S. 664, at 668 (1970) (Opinion of the Court per Burger, C. J.), and at 681-87 (Brennan, J., concurring); *Abington School District v. Schempp*, 374 U.S. 203, 232-42 (1963) (Brennan, J., concurring). While recognizing that "an awareness of history . . . do[es] not always resolve concrete problems," *Schempp, supra*, at 234 (Brennan, J., concurring), amici suggest that the history of American higher education provides helpful background for understanding the issues presented in this case. During the earliest colonial period, higher education was sponsored exclusively by religious groups. For example, the first American college, Harvard, founded in 1636, was patterned after Emmanuel College at Cambridge University. The Harvard mottoes were "Christo et

ecclesiae" ("For Christ and the Church") and "In Christi Gloriam" ("Unto the Glory of Christ"), and its curriculum combined a classical liberal arts education[1] with instruction in the Christian religion. See S. Morison, *The Founding of Harvard College* (1935). A famous pamphlet published in 1643 describing the purposes of America's first college clearly included religious formation among the objects of higher education. See "New England's First Fruits" (1643), *Collections, Mass. Hist. Society* (1792) vol. I, pp. 242-48, reprinted in *The Annals of America* (1968) vol. I, pp. 175-79. This statement of purpose and description of Harvard's curriculum is likewise descriptive of the religious motivation of the other colonial institutions founded after Harvard, including Brown, Columbia, Dartmouth, Pennsylvania, Princeton, Rutgers, Washington and Lee, William and Mary, and Yale, all of which were "strongly religious in tone and curriculum, although not all were sponsored by individual denominations."[2]

It is significant that the earliest state universities differed very little in this respect from the colleges founded in colonial times by religious denominations. See W. Bean "What is the State University?" in E. Walter, ed., *Religion and the State University* 60-61 (1958). For example, one of the most eminent presidents of a prestigious state university, Thomas Jefferson, planned to include religious teachings in the University of Virginia's curri-

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[1]For a discussion of the essential components of liberal education in the West for the past fifteen centuries, see C. Dawson, *The Crisis of Western Education* (1961), and C. Haskins, *The Rise of Universities* (1957).

[2]M. Pattillo and D. Mackenzie, *Church-Sponsored Higher Education in the United States* 3 (1966); see also L. Cremin, *American Education: The Colonial Experience, 1607-1783* (1970), and J. Smylie, "Roads to Our Present," in R. Parsonage, ed., *Church Related Higher Education* 135-75 (1978).

culum in a way calculated to encourage morality and a belief in God but not to foster a preferential establishment of one sect's beliefs over another's. See J. Randolph, ed., *Early History of the University of Virginia as Contained in the Letters of Thomas Jefferson and Joseph C. Cabell* 441 (1856), as cited in Hansen, "Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor", 1978 Brigham Young U. L. Rev. 645, 670. In 1822 Jefferson repudiated as a "calumny" the suggestion that the University of Virginia was "an institution, not merely of no [particular] religion, but against all religions." Letter from Jefferson to Thomas Cooper, November 2, 1822, reprinted in P. Ford, ed., 12 *The Works of Thomas Jefferson* 272 (1905). In the same year Jefferson put forward a plan for incorporating religious studies and religious worship in the life of the campus. In this plan Jefferson wrote:

> It was not, however, to be understood that instruction in religious opinions and duties was meant to be precluded by the public authorities as indifferent to the interests of society; on the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University. . . .

J. Randolph, ed., *Early History of the University of Virginia* 474, as cited in Hansen, "Jefferson and the Church-State Wall", 1978 Brigham Young U. L. Rev. 670-71. Jefferson thought that the inclusion of what we would now call religious studies programs and campus ministry programs within the confines of the university would be beneficial not only to theological students training for the ministry but also for the full-time student body:

> Such establishments would offer the further and great advantage of enabling students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under *impartial regulations* . . . or in the lecturing room of such professor. *Ibid.* (emphasis supplied).

In the letter to Dr. Cooper mentioned above, Jefferson wrote of this plan as follows:

> In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of *encouraging the different religious sects* to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have the free use of our library, and *every other accomodation we can give them;* preserving, however, their independence of us and of each other. . . . And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason and morality.

Jefferson to Cooper, November 2, 1822, reprinted in P. Ford,

ed., 12 *The Works of Thomas Jefferson* 272 (1905) (emphasis supplied).

Throughout the nineteenth century and for a variety of reasons, several of the institutions of higher education that originally had been created and supported by religious denominations weakened or severed their ties to the religious groups with which they previously had been affiliated. This gradual and sometimes imperceptible shift from church-related to independent private status did not, however, necessarily imply a lessening of concern for religious instruction in the college curriculum. For example, in 1855 David Walker, the President of Harvard, maintained that the college should not be equated simply with the church, but that a distinction had to be drawn between "Christianity considered as a means of enlightening and civilizing men in their relations to each other and the world, and Christianity considered as a means of eternal salvation to individuals." The former was in Walker's view appropriate as a discipline for study in the university, but the latter was to be reserved for the mission of the church. See G. Schmidt, *The Liberal Arts College: A Chapter in American Cultural History* 39 (1957), and P. Limbert, *Denominational Policies in the Support and Supervision of Higher Education* 11 (1929).

With the establishment of the land-grant colleges as a result of the Morrill Acts, the states in the latter decades of the nineteenth centuries began the progress of expansion of public facilities providing higher education. See G. Rainsford, *Congress and Higher Education in the Nineteenth Century* (1972). This pattern of growth has now reached the point that in academic year 1978-1979 state colleges and universities enrolled nearly 78% of all students engaged in higher education. According to the projections of the National Center for Education Statistics in the U.S. Department of Education, this ratio of better than three

to one in the student enrollment in public institutions over that in private institutions is expected to increase, but only slightly, over the next decade. See *The Condition of Education (1980)*.

Amici urge that the history of American higher education which culminates in the numerical predominance of the public sector should not mean that voluntary participation in religious studies and religious worship should be excluded by state regulation from all publicly supported institutions of higher education. To the contrary, precisely because the states have undertaken the task of providing higher education for the vast majority of Americans who go on to college, amici suggest that the states have an affirmative obligation, at the minimum, to be sensitive to the legitimate religious needs of students and faculty members on public campuses. See *Schempp, supra*, at 296-99 (Brennan, J., concurring). To say otherwise is to ignore the wisdom of fifteen centuries of the understanding of a liberal education in the West, which has always included the study of religion. To be sure, the no-establishment principle prohibits the states from coercing obedience to any religious beliefs and from fostering one particular religious group and its teachings or observances over another. See *Walz, supra*, at 694-97 (Harlan, J., concurring). As this Court has repeatedly observed, however, the no-establishment principle is not to be translated into an attitude of official hostility toward religion, but into one of "benevolent neutrality," accommodating religious interests whenever that is possible. See, e.g., *Walz, supra*, at 669; *Schempp, supra*, at 222, 225; and *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

In the spring of 1981, the Center for Constitutional Studies conducted a nationwide survey of campus ministers at state colleges and universities. The focus of the study was on the access or denial of access to public campuses experienced by

these ministers.[3] The survey instrument was mailed to all campus ministers serving state institutions who are listed in the directory of amicus United Ministries in Education. Since this group is primarily composed of mainstream Protestant ministers, the survey instrument was also sent to all Hillel directors at state campuses, and to twenty-seven Roman Catholic diocesan directors of campus ministry. Of the 325 to whom the survey was sent, 189 participated in the study. The denominational or religious affiliation of the respondents included the following: African Methodist Episcopal Zion, Assembly of God, American Baptist, Brethren, Disciples, Episcopal, Jewish, Lutheran, Presbyterian Church in the U.S., Reformed Church, Roman Catholic, Southern Baptist, United Church of Christ, United Methodist Church, and United Presbyterian Church in the U.S.A.

Forty-three of the respondents (23.8%) indicated that state regulations governing use of campus facilities had restricted their access to students desiring their ministry. Several Roman Catholic respondents complained that rules prohibiting all forms of religious services, including Bible study, impose a significant hardship on religious believers with a strong liturgical tradition because the state cannot easily identify a small group of persons gathering for purposes of studying the Bible but can readily identify and prohibit larger meetings of persons gathering for more obviously visible religious ceremonies. Protestant campus ministers complained that they are not allowed to share a meal

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[3]A copy of the survey instrument has been mailed to the parties in this litigation and is available upon request to the Librarian of the Supreme Court and to other interested persons. Because of the professional requirements of confidentiality governing studies of this nature, our findings are reported only in a statistical form, but the responses stripped of any individually identifiable characteristics are likewise available upon request to the Center for Constitutional Studies.

on a paying basis with students in a cafeteria, to rent facilities on campus for purposes of conducting seminars on the Reformation, nor even in some instances to publicize their off-campus activities. A rabbi with 30 years experience in Hillel work, 29 of them at a state campus, complained of the difficulty of reaching Jewish students unless he has access to voluntarily stated religious preference information; such information has been routinely provided at one large state university, but is denied to campus ministers at other campuses within the same state system. A Methodist minister similarly complained that the construction of the Buckley Amendment, 20 U.S.C. § 1232g, by university counsel at one state university has resulted in a similar denial of access to voluntarily stated information concerning denominational preference.

The state regulations that the petitioner asks this Court to sustain are broad and sweeping. They have the effect of banning religious worship and religious instruction on state campuses even though such gatherings would occur at no expense to the state (the respondent students were denied access to the university lawn for purposes of conducting their meeting, Petition for Writ of Certiorari, A-6). Amici fear that the federalization of such sweeping state regulations could significantly affect the ability of campus ministers to carry out their work of counselling, religious instruction, and leading worship at state institutions. This fear is grounded in the responses of the 189 campus ministers participating in this study to questions concerning the appropriateness or desirability of regulations such as those at issue in the instant case. When asked about state regulation that would bar any use of a university building or of the university grounds for *religious worship*, only 11 persons (5.8%) indicated that they strongly agreed that such a regulation is appropriate or desirable; another 11 (5.8%) agreed; 76 (40.2%) disagreed and 90 (47.6%) strongly dis-

agreed; 1 person (.5%) expressed no opinion on this matter. The combined total of agreement with such regulations was 11.6% of the population; disagreement or strong disagreement was reflected by 87.6%.

Even fewer respondents thought it is appropriate or desirable for a state to prohibit the use of university buildings or of the grounds for the purpose of the *study of religion,* as for example, with a Bible study group, a seminar on Calvin or Luther, or classes on Talmudic interpretation. Only 4 (2.1%) of the respondents strongly agreed that a regulation of this sort was appropriate or desirable; 8 (4.2%) agreed; 60 (31.7%) disagreed; and 115 (60.9%) strongly disagreed that such a regulation was either appropriate or desirable; 2 persons (1%) expressed no opinion in this matter. The combined totals of agreement with state regulation prohibiting the use of public facilities at a state university for religious study was 6.3%; disagreement with such regulation was reflected by 92.6%.

Participants in this study were aware of the potential danger of a governmental establishment of religion that might arise where, unlike the instant case, the state were to subsidize a particular religious group in a significant way. But as one rabbi put it, "Too often the phrase 'separation of church and state' is used as a euphemism to mean 'Get lost, Charlie.' The University community still has a long way to go to learn that separation of church and state means no entanglement — one cannot and should not control the other." There was likewise a sensitivity to the central value of voluntarism protected by the no-establishment principle. A Methodist campus minister, for example, stated: "Students should be free to study and practice religion, but they should be free from coercion in dormitories by any political or religious groups." A Presbyterian minister with 25 years experience on state campuses wrote: "For the state to support or favor one particular religion in contradistinction to

others would be wrong. For sectarian religious teaching to be required would be wrong. . . . However, students should be free to associate and to exercise their religion. . . . Also, the Church should be free to express its critique of any aspect of the university on the government."

Survey respondents were opposed to regulation of communication based on the content of the communication. An Episcopal minister wrote: "A wisely and fairly administered policy treating religious exercise in much the same way as political rallies . . . or fraternal organizations . . . would be in the best interests of all: no special favors, no special prohibitions." But the survey participants were sensitive to the legitimacy of the governmental interest in reasonable regulation of the time, place, and manner of speech. As another rabbi put it, "I believe that every campus should provide a place for worship and religious study, but not that every place on campus should be available for worship."

In short, the campus ministers who participated in this survey reflected sophisticated awareness of and respect for constitutional values, including the protection of minorities. Hence their response to a question directly concerning the instant case cannot be dismissed as merely self-serving or uninformed. One hundred and forty-five (76.7%) of the survey respondents expressed strong agreement with the view that "In deciding the *Widmar* case, the Supreme Court should take into account not only the potential danger of a governmental establishment of religion prohibited by the First Amendment, but also the necessity of accommodating the legitimate interests of college students to free exercise of religion protected by that Amendment"; 41 (21.7%) expressed agreement with this view; two (1%) expressed disagreement; and one (.5%) expressed strong disagreement. This represents virtual unanimity (98.4%) on

this matter among Jewish, Protestant, and Catholic campus ministers at state universities.

Amici report this statistical information to this Court not to suggest that complex constitutional adjudication can be resolved solely by resort to opinion polls, but to assist this Court in understanding the damaging impact that a reversal of the judgment of the Court of Appeals could have on the legitimate work of campus ministers of all faiths at state colleges and universities. Now that public institutions have become the wholesalers of higher education, amici urge that the very growth of the state's role in American higher education requires the states to be sensitive to a broad spectrum of human values, including voluntarily chosen religious values, whenever the states attempt to regulate and control the educational experience. In other words, public colleges and universities have special responsibilities toward safeguarding the vitality of First Amendment freedoms for the vast majority of our population that goes on to college.

B. THE REGULATIONS IN THE INSTANT CASE HAVE THE EFFECT OF REGULATING SPEECH AND ASSOCIATIONAL RIGHTS ON THE IMPERMISSIBLE BASIS OF THE RELIGIOUS CONTENT OF COMMUNICATION AND ASSOCIATION.

As the Court of Appeals correctly observed in the instant case, religious speech is no less protected by the First Amendment than other speech. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-39 (1980); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296

(1940). Similarly, the freedom to associate for the advancement of religious beliefs is no less protected by the First Amendment than the freedom to associate for the advancement of beliefs that are political, economic or cultural in nature. See *McDaniel v. Paty,* 435 U.S. 618, 641 (1978) (Brennan, J., concurring); *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958). The regulations that the petitioner asks this Court to sustain militate against the whole corpus of free speech doctrine elaborated by this Court, for the "government has no power to restrict expression because of its message, its idea, its subject matter, or its content. . . ." *Police Dept. of City of Chicago v. Mosely,* 408 U.S. 92, 95-96 (1972).

As recently as last year this Court had occasion to reiterate its teaching in *Mosely* and to recast it in terms of Equal Protection analysis, mandating that "when government regulation discriminates among speech-related activities in a public forum, . . . the legislation must be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown,* 447 U.S. 455, 461-62 (1980). As amici argue in the following portion of this brief, the state interest asserted here by the petitioner relating to the potential danger of a governmental establishment of religion is premised on a misunderstanding of the no-establishment principle. This misunderstanding cannot stand as the "substantial state interest" required by the teaching of this Court on Equal Protection analysis, see, e.g., *Craig v. Boren,* 429 U.S. 190 (1976), nor can the regulations promulgated by the University of Missouri withstand the careful scrutiny required under such circumstances. When, as here, a state university makes its campus facilities available to various student organizations that it has no desire to support or to endorse, *Gay Lib v. University of Missouri,* 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S.

981 (1978), it cannot be heard to offer as its justification for discriminating against student groups voluntarily organized for religious purposes that to allow equal access to campus facilities for religious organizations would constitute official support or endorsement of that religious perspective. Hence, when the government denies such access only to a voluntary association wishing to use the facility to engage in religious speech, the government has created a content-based restraint which unduly burdens the expression and communication of ideas. See L. Tribe, *American Constitutional Law* 580-582 (1978). As Justice Brennan has stated: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty*, 435 U.S. 618, 641 (Brennan, J., concurring). See also L. Tribe, *American Constitutional Law*, 1979 supp. at 78-79 ("government may not constitutionally use religion as a basis for burdensome classifications"). See also *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 334 U.S. 558 (1948), and *Tucker v. Texas*, 326 U.S. 517 (1946).

The Court of Appeals noted that the regulations at issue here impose a significant burden on the students' freedom of association. The desire to gather together into groups is a typically American practice. As Alexis de Tocqueville observed over a century ago:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them.

A. de Tocqueville, I *Democracy in America* 196 (P. Bradley, ed.

1945).[4]

Although there are no decisions of this Court squarely holding that a voluntary association of students seeking to pray together is protected by freedom of association, there is no principled way of distinguishing between the respondents here and other groups to which this Court has explicitly extended the protection of freedom of association in its prior decisions dealing with this freedom, including civil rights groups, *NAACP v. Alabama,* 357 U.S. 449 (1958), political parties, *Buckley v. Valeo,* 424 U.S. 1 (1976), labor organizations, *United Transportation Union v. Michigan,* 401 U.S. 576 (1971), banks and other for-profit corporations, *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), and religious bodies, *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952). To fail to extend to the student respondents in the instant case the constitutional protection extended to the on-campus activities of Students for a Democratic Society, *Healy v. James,* 408 U.S. 169 (1972), or to students seeking official recognition of a gay rights organization, *Gay Lib. v. University of Missouri, supra,* would run counter to the notion that the rights of religious associations should be protected no less than those of other student groups organized for legitimate ends, *McDaniel v. Paty, supra* at 641 (Brennan, J., concurring). And among these rights should be equal access to public facilities on a neutral and non-discriminatory basis.

The recent expansion by this Court of the doctrine of

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[4]See Raggi, "An Independent Right to Freedom of Association," 12 Harv. Civ. Rts-Civ. Lib. L. Rev. 1 (1977). And see Gaffney, "The Constitution and the Campus: The Case for Institutional Integrity and the Need for Critical Self-Evaluation," in J. Mosely, ed. *3 Church and College: A Vital Partnership* 54-56, 60-62 (1980); Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1 (1974); Rice, "The Constitutional Right of Association" 16 Hastings L.J. 491 (1965); C. Rice, *Freedom of Association* (1962).

corporate free speech, see e.g., *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530 (1980), *Central Hudson Gas Co. v. Public Service Comm'n.* 447 U.S. 557 (1980), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785 (1978), suggests, moreover, that if the free speech rights of for-profit corporations merit constitutional protection against legislative enactments seeking to regulate such speech, the free speech rights of not-for-profit corporations similar to voluntary associations like the respondent in the instant case likewise merits constitutional support.

C. THE REGULATIONS IN THE INSTANT CASE ARE NOT REQUIRED BY THE HISTORICAL INTENT OF THE NO-ESTABLISHMENT CLAUSE, NOR BY SUBSEQUENT INTERPRETATIONS OF THE MEANING OF THAT CLAUSE BY THIS COURT, NOR BY CONTEMPORARY PRACTICE IN MANY PUBLIC INSTITUTIONS OF HIGHER EDUCATION

As was suggested above, from the founding of Harvard in 1636, religion has occupied a significant role in American higher education, whether the campus was related to a church, independent of both a church body and the state, or supported and operated by the state. The actual practice of Thomas Jefferson as President of the University of Virginia suggests that for this founding father, at least, there was no irreconcilable conflict between the no-establishment principle to which Jefferson was firmly committed, see, e.g., Letter to Danbury Baptists, January 1, 1802, as cited in A. Koch and W. Peden, *The Life and Selected Writings of Thomas Jefferson* 332 (1944), and the reasonable accommodation of religious worship and religious instruction on state campuses.

A simplistic reading of the intent of the Establishment Clause

should not be allowed to stand as a rationale for excluding religionists from the protection of freedom of speech and association or for denigrating a free exercise claim because of a highly dubious conjecture that accommodation of that interest would impermissibly establish a religion.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect.

M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 9, 15 (1978). In particular, the discriminatory denial of the use of public facilities to voluntary associations who gather for a religious purpose cannot be justified by a vague reference to James Madison, for the views of the floor manager of the First Amendment were not those impliedly argued here by the petitioner. For example, the first text that Madison proposed to the Congress read as follows: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of*

Congress 434 (June 8, 1789). It was Madison, moreover, who endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter of Madison to M. L. Hurlbert, May, 1830, in G. Hunt, ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the respondents. See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964).

Madison also suggested that the meaning of the Establishment Clause is to be ascertained from considering the "true sense in which it was adopted by the states." This sense is reflected, for example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833). In this view, the religion clauses were designed to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious groups." C. Antieau, A. Downey, and E. Roberts, *Freedom From Federal Establishment* 160 (1964); see also Walter Berns, *The First Amendment and the Future of American Democracy*

(1976). By affirming the judgment of the Court of Appeals, this Court could clarify that the historic purpose of the Religion Clauses was not to stifle voluntary association for the purpose of engaging in religious activities, but to keep the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

Subsequent interpretation of the meaning of the religion clauses of the First Amendment has not absolutized either of those clauses. To the contrary, this Court has repeatedly tried to preserve not simply a delicate balance, but a healthy, creative tension between these clauses. For example, this Court has suggested that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission, supra,* at 669.

This Court has ruled that the government may not burden legitimate claims of free exercise of religion unless it has a truly compelling justification for doing so, and unless it has done so in a manner that places the least restrictive burden upon the exercise of religious freedom. *Sherbert v. Verner,* 374 U.S. 398 (1963). The relationship between the free exercise interest protected in *Sherbert* and in cases similar to it, e.g., *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and the no-establishment principle asserted in *Everson v. Bd. of Education,* 330 U.S. 1 (1947) and its progeny has never been clarified in a hard and fast ruling of this Court, but has been left to case by case adjudication. Analysis of the body of Church-State law that has developed since *Everson,* however, discloses that this Court has repeatedly affirmed that free exercise values are significant and need breathing space. This Court has never taught that legitimate free exercise claims may easily be defeated by engaging in a balancing of interests in which the no-establishment principle would always be the dominant concern.

Some courts, including the District Court in the instant case, apparently assume that reasonable accommodations of religious beliefs and practices constitute an impermissible establishment of religion. See, e.g. *Brandon v. Bd. of Ed.*, 635 F.2d 971, 978-79 (2d Cir. 1980); *Thomas v. Review Bd. of Indiana Employment Security Division*, 391 N.E. 2d 1127 (Ind. 1979), rev'd., 101 S. Ct. 1425 (1981). But to indulge this assumption is to take an absolutist interpretation of one value protected in the First Amendment, the no-establishment principle, and to reduce the other value protected in the same text, the free exercise principle, to a nullity. It is just such an expansive reading of one clause as clashing with the other that this Court repudiated in *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). See also *Sherbert*, supra at 415-16 (Stewart, J., concurring) ("the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief"). To turn aside the free exercise claim presented by the respondents on the basis of the conjecture or the worry that their praying together voluntarily might result in an impermissible establishment of religion merely demonstrates how far some courts have moved away from the balance struck in favor of free exercise values in *Sherbert*, *Yoder*, and recently confirmed by this Court in *Thomas*.

It must be stressed that the respondents are not infants, but are mature students. They are of sufficient maturity to register to vote, and, if it were necessary, to serve in the armed forces; see *Healy v. James*, 408 U.S. 169, 197 (Douglas, J., concurring), and *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir.), application for injunction denied, 444 U.S. 890 (1979). It is a gross misunderstanding of the level of their maturity to treat them in a paternalistic fashion as though they were infants incapable of any intelligent, truly voluntary decision-making.

Nothing in the prior decisions of this Court justifies the view of the petitioner that the government must allow on public campuses sundry forms of political speech, but may ban from a public campus the voluntarily meeting of mature students for purposes of engaging in speech the content of which is religious. For "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978). By affirming the judgment of the Court of Appeals, this Court could reaffirm its teaching concerning the importance of free exercise values in cases of potential conflict with no-establishment principle.[5]

The view of the petitioner that any accommodation of the religious interests of students or faculty members at the University of Missouri would offend against that state's constitution, moreover, overlooks the fact that after the enactment of the Fourteenth Amendment, no state may, consistently with the liberty aspect of the Due Process Clause, unduly burden the rights of any person to the free exercise of religion, free speech, and freedom of association. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); and see Black, "The Supreme Court, 1966 Term; Foreword: "State Action," Equal Protection, and California's Proposition 14," 81 Harv. L. Rev. 69 (1967). Nor may any

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[5]See, e.g., *Thomas v. Review Bd. of Indiana Employment Security Division*, 101 S. Ct. 1425 (1981); *McDaniel v. Paty*, 435 U.S. 618, 619-641 (1978) (Brennan, J., concurring). And see Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980); Fink, "The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values," 27 Cath. U. L. Rev. 207 (1978); Pfeffer, "The Supremacy of Free Exercise," 61 Georgetown L.J. 1115 (1973); and Gianella, "Religious Liberty, Non-Establishment, and Doctrinal Development." 80 Harv. L. Rev. 1381, 1389 (1967).

state, consistently with the Equal Protection Clause, enact discriminatory, content-based regulations such as those at issue here. In the view of the amici, the federal constitutional claims have been correctly addressed by the Court of Appeals and the judgment of that Court should be affirmed.

The kind of regulations at issue here, moreover, are not thought to be constitutionally required or sound educational policy in many public institutions of higher education. The University of Delaware, for example, allows the student commons to be used regularly for religious worship. *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976); but see *Dittman v. Western Washington University*, ____ F. Supp. ____ (W.D. Wash. 1980) app. pending, 9th Cir. The University of Iowa has for decades had a distinguished department of religious studies, and similar programs are now in operation in the majority of the state college and university systems. Moreover, the study of the Bible as literature is clearly permissible. *Calvary Bible Presbyterian Ch. v. Bd. of Regents*, 72 Wash. 2d 912, 436 P.2d 189 (1967); see also *Schempp, supra*, at 225, and at 300 (Brennan, J., concurring), and at 306 (Goldberg, J., concurring).

On the occasion of the centennial celebration of religious activities on the campus of the University of Michigan, the eminent constitutional scholar Paul Kauper observed that if the First Amendment required that state universities refrain from doing anything to accommodate the religious interests of students and faculty members on public campuses, "it becomes extraordinarily remarkable to what extent our state universities for almost a century have engaged in unconstitutional practices. Or perhaps the more sensible conclusion can be drawn that these practices have given us a practical interpretation, founded on public approval and an understanding of the university function, which is more vital and authoritative than logical con-

clusions drawn from abstract propositions." P. Kauper, in *Legal and Other Critical Issues of Religion in Public Higher Education* 20 (1958). Three years later Professor Kauper wrote: "If the government without dictating or coercing belief on any one's part recognizes the place of religion in the life of the community, and, without preferring one or more religious groups, accommodates its program and the use of its facilities to religious needs and supports activities in which the government and the churches have a concurrent interest and common concern, religious freedom is not placed in jeopardy. On the contrary, it may be argued that the government is thereby contributing to religious freedom and making it more meaningful. Some situations may arise when a choice must even be made between the non-establishment principle as broadly conceived and the principle that the government may not discriminate on religious grounds." Kauper, "Church and State: Cooperative Separation," 60 *Mich. L. Rev.* 1, 6 (1961).

Most recently, the Association for the Coordination of University Religious Affairs (ACURA) at its annual meeting in Washington, D.C., in March of 1981 authorized the preparation of a statement of Standards for Religious Programs. These proposed standards urge that "All colleges and universities, public or private, which profess interest in the development of the whole student, obligate themselves to provide directly or indirectly for spiritual and religious development of students."[6]

This cursory review of the practices of public universities and of standards proposed for religious programs in all American institutions of higher education, whether public or private,

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[6]The proposed Standards have been published in *Dialogue on Campus*, vol. XVI, no. 3 (Spring 1981) pp. 3-6, and are available to the parties in this litigation and to the Librarian of the Supreme Court upon request to the Center for Constitutional Studies.

suggests that the posture adopted by the petitioner in the instant case reflects not an attitude of benevolent neutrality, but of official hostility to religion that is not warranted by the First Amendment and that is contrary to its historical intent and subsequent interpretation.

II. UNLESS THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED, FEDERAL REGULATION OF CHURCH-RELATED HIGHER EDUCATION MAY, IN IMPORTANT RESPECTS, REMAIN EXCESSIVELY RESTRICTIVE AND BURDENSOME.

The Center for Constitutional Studies focuses much of its efforts on legal issues affecting church-related higher education, and in so doing the staff of this Center has come to acquire considerable experience with the interpretations by various federal officials of this Court's decisions concerning the religion clauses of the First Amendment.[7] Like the judgment of the District Court in this case, these administrative judgments often go far beyond the holdings of this Court, and the amici are in a position to suggest to this Court the impact that the decision of this Court in this case could have on religiously affiliated higher education.

Many of the church-related colleges and universities that form the broad ecumenical constituency of concern of the Center for Constitutional Studies have, for example, received federal financial institutional assistance in the form of grants or loans authorized in the Higher Education Facilities Act of 1963,

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[7]See e.g., P. Moots and E. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education (1979); and E. Gaffney and P. Moots, The Government and the Campus: Federal Regulation of Religously Affiliated Higher Education* (1981).

Pub. L. 88-204, 77 Stat. 363, sustained by this Court in *Tilton v. Richardson,* 403 U.S. 672 (1971). This federal statute prohibits the use of any building constructed in part or in whole with such federal subsidies for "sectarian instruction or as a place for religious worship." 20 U.S.C. §1132(e)-1(B)(iii). Because of this statutory provision, the Department of Education requires all institutions that have ever participated in this program to certify on a regular basis that they do not allow federally funded facilities to be used in an impermissible way. 45 C.F.R. §100a et seq. and §170.

As part of a study of the impact of federal regulation on religiously affiliated colleges and universities, the Center for Constitutional Studies conducted an extensive survey of the chief administrators of these institutions in 1978.[8] One of the results of this study is that the college administrators participating in the study rarely complained that federal regulation in and of itself impeded these institutions from carrying out their religious mission or purpose. A notable exception to this finding was the frequent complaint that strained interpretations concerning the use of federally funded facilities for any sort of religious purpose (e.g., sacred music courses) constituted governmental interference. This study disclosed several instances of administrative hostility toward religion on church-related campuses.

One of the reasons why churches in this country have engaged for centuries in an educational mission is to stress that

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[8]The results of this study are to be published by the University of Notre Dame Press in 1981 under the title *The Government and the Campus: Federal Regulation of Religiously Affiliated Higher Education.* The page proofs of this study are available to the Librarian of the Supreme Court, and to the parties in this litigation, upon request to the Center for Constitutional Studies.

religious studies form an integral part of a liberal education.[9] Amici maintain that college students are to be encouraged to pursue such studies and to observe the practices connected with their voluntarily embraced religious commitments, whether on public campuses or private campuses. This Court's decision will undoubtedly affect the administrative process governing the regulation of the use of federally funded facilities at church-related colleges. By affirming the judgment of the Court of Appeals, this Court can assist federal officials charged with implementation of the *Tilton* guidelines to understand not only what the First Amendment forbids, but also what it allows. In this way, the Court can alleviate the impact of the federal regulations most frequently identified by administrators at religiously affiliated colleges as an excessively burdensome interference with the religious mission and purpose of these institutions.

III. BY AFFIRMING THE JUDGMENT OF THE COURT OF APPEALS, THIS COURT CAN CLARIFY ITS TEACHING CONCERNING THE PERMISSIBILITY OF GENUINELY VOLUNTARY PRAYER.

In his opinion for this Court in *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980)

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[9]See, e.g., J. Mosely, ed., *Church and College: A Vital Partnership* 4 vols. (1980); B. Fisher, ed. *New Pathways: A Dialogue in Christian Higher Education* (1980); J. Westerhoff, ed., *The Church's Ministry in Higher Education* (1978); R. Parsonage, ed., *Church Related Higher Education: Perceptions and Perspectives* (1978); E. Carlson, *The Future of Church-Related Higher Education* (1977); R. Baepler and A. Olsen, eds., *The Church-Related College in an Age of Pluralism: The Quest for a Viable Saga* (1977); National Commission on United Methodist Higher Education, *A College-Related Church: United Methodist Perspectives* (1976) and *Endangered Service: Independent Colleges, Public Policy and the First Amendment* (1976); and J. Newman, *The Idea of a University* (Image Book ed. 1959).

Justice White wrote that "Establishment Clause cases are not easy; they stir deep feelings. . . ." *id.* at 662. This Court's decisions in *Engel v. Vitale,* 370 U.S. 421 (1962) and in *Abington School District v. Schempp,* 374 U.S. 203 (1963) have surely been among the cases that have stirred "deep feelings" in the Republic. The impact of these decisions on the American political process has been studied extensively.[10] Much of the initial furor over these two cases was based on a failure to read those decisions carefully, if at all.[11] This case offers this Court the opportunity to clarify its teaching adumbrated in *Engel* and *Schempp* concerning the permissibility of genuinely voluntary prayer.

The opinion of the District Court in the instant case is an example of the damage that can be done to valuable constitutional rights if those charged with applying *Engel* and *Schempp* to a variety of factual patterns stray too far beyond the holdings

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[10]See, e.g. Beaney and Beiser, "Prayer and Politics: The Impact of *Engel* and *Schempp* on the Political Process" 13 J. of Pub. L. 475 (1964) reprinted in T. Becker, ed. *The Impact of Supreme Court Decisions* 20-34 (1969). For other examples of impact studies relating to the *Engel* and *Schempp* decision, see Katz, "Patterns of Compliance with the *Schempp* Decision," 14 J. Pub. L. 396 (1963); Birkby, "The Supreme Court and the Bible: Tennessee Reactions to the *Schempp* Decision" 10 Midwest J. of Pol. Sci. 304 (Aug. 1966); R. Johnson, *The Dynamics of Complaince: Supreme Court Decision-Making From a New Perspective* (1967); Reich, "The Impact of Judicial Decision-Making: The School Prayer Cases," in D. Everson, ed., *The Supreme Court as Policy Maker: Three Studies on the Impact of Judicial Decisions* 44-81 (1968); W. Muir, *Prayer in the Public Schools: Law and Attitude Change* (1967); and K. Dolbeare and P. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (1971).

[11]For an account of the congressional reaction, see Beaney and Beiser, note 10 *supra.* And see 125 Cong. Rec. S 4128-4131 (daily ed., Apr. 5, 1979) (purporting to limit Supreme Court jurisdiction over cases involving "voluntary prayer"), and S 4138-4152 (daily ed., Apr. 9, 1979) (same).

of those cases. This is not to suggest that this Court should reverse the decisions announced in those cases. For in affirming the judgment of the Court of Appeals, this Court need not retreat from its holding in *Engel* that the states should refrain from composing prayers for public recitation in the public schools, or from its ruling in *Schempp* that the states should eschew even subtle forms of coerced participation in devotional exercises.

Many constitutional scholars have construed the real significance of this Court's ruling in *Zorach v. Clauson,* 343 U.S. 306 (1952) and *McCollum v. Bd. of Education,* 333 U.S. 203 (1948) as a unified prohibition of employing "the *force* of the public school . . . to promote [religious] instruction." *Zorach, supra* at 315 (emphasis added). See Toms and Whitehead, "The Religious Student In Public Education: Resolving a Constitutional Dilemma," 27 Emory L. J. 3 (1978), and literature cited therein. There is no evidence of a "captive audience" in the case at bar. Professor Laurence Tribe suggests that the gist of the offense in *McCollum* was "the combination of material, organizational, and, above all, *symbolic* support for religious instruction," *American Constitutional Law* 825 (1978). No such support was sought by the respondents in this case. Ardent opponents of school prayer amendments have testified before congressional committees that the crux of the issue is that the State cannot *promote* or *establish* the reading of the Bible or the recitation of prayers. For example, in April of 1964 the well known constitutional scholar, Dr. Leo Pfeffer testified as follows:

> There is not one word in any decision of the Supreme Court including Murray, Engel, Zorach, or McCollum, or any State court decision which can, to any extent, be interpreted as forbidding children to pray or to read the Bible in the public schools. . . . All it says is that the State through its agencies cannot promote or establish

the reading of the Bible or recitation of prayers.

Hearings on School Prayer before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee 89th Cong., 2d Sess. 188 (1966). In the 1966 Senate hearings Dr. Pfeffer stated:

> Nothing in any decision of the Supreme Court forbids an individual schoolchild voluntarily to offer a prayer before or after taking of food or perhaps on other occasions, so long as the regular discipline of the school and other children is not thereby disturbed or interfered with.

Id. at 345-346. For similar statements, see *id.* at 215 (statement of Baptist Joint Committee on Public Affairs), at 263 (statement of Department of Social Responsibility, Unitarian Universalist Association), and at 307 (statement of Methodist Bishop Richard Raines). Since the record in the instant case discloses that the activity that the respondents sought to engage in need not be *sponsored* or financially supported by the university administration, any more than it sponsors or put its official stamp of approval on other student organizations allowed to meet on campus, *Healy v. James, supra, Gay Lib v. University of Missouri, supra,* this case presents an opportunity for this Court to clarify that *truly* voluntary prayer is constitutionally permissible.

CONCLUSION

For the reasons stated above, amici urge that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

State of Indiana)
) ss.:
St. Joseph County)

On this _____ day of May, 1981, before me, a Notary Public for the State of Indiana and St. Joseph County, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the Brief of the Center for Constitutional Studies of the University of Notre Dame Law School, the National Council of Churches of Christ in the U.S.A., the National Institute of Campus Ministry, and United Ministries in Education as Amici Curiae in Support of the Respondents to the following attorneys:

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Sworn to and Subscribed before me
the day and year aforesaid.

Rosemary K. Reiter, Notary Public

MOTION FILED
JUN 3 1981

NO. 80-689

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

GARY E. WIDMAR, et al.,

Petitioners

vs.

CLARK VINCENT, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Holy Spirit Association for the Unification of World Christianity (hereinafter, "Unification Church" or "Church") hereby respectfully moves, pursuant to Sup. Ct. R. 36, for leave to file the accompanying brief Amicus Curiae in this appeal. The motion is based on the following grounds:

A. Interest of the Unification Church.

1. The Unification Church is a California non-profit religious corporation, holding, inter alia, federal, California, and Illinois tax exemptions. The Unification Church was founded in 1954 and is now established in hundreds of cities throughout the United States and the world. The Church teaches fundamental religious beliefs and emphasizes prayer, evangelical missionary engagements, religious rallies, workshops, retreats, and lectures. An important part of the Church's activities in furtherance of its beliefs consists of public-place proselytizing of its tenets and principles, frequently accompanied by the solicitation

of funds from the public for support of the Church.

2. In the latter connection, the Church and its members deal on a continuing basis with state and local laws and other rules regulating public solicitation of funds. On numerous occasions, the Church or its members have been obliged to engage in litigation concerning many aspects of the validity of these enactments, */ and they expect that such litigation will

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*/ Reported cases dealing with such challenges by the Unification Church or its members include, e.g., Westfall v. Board of Comm'rs, 477 F. Supp. 862 (N.D. Ga. 1979); Walker v. Wegner, 477 F. Supp. 648 (D.S.D. 1979); Erskine v. West Palm Beach, 473 F. Supp. 48 (S.D. Fla. 1979); Weissman v. City of Alamogordo, 472 F. Supp. 425 (D.N.M. 1979); Holy Spirit Ass'n for the Unification of World Christianity v. Alley, 460 F. Supp. 346 (N.D. Tex. 1978); Cherris v. Amundson, 460 F. Supp. 326 (E.D. La. 1978); Smith v. City of Manchester, 460 F. Supp. 30 (E.D. Tenn. 1978); Hall v. McNamara, 456 F. Supp. 245 (N.D. Cal. 1978); Swearson v. Meyers, 455 F. Supp. 88 (D. Kan. 1978); Love v. Mayor of Cheyenne, 448 F. Supp. 128 (D. Wyo. 1978); Levers v. City of Tullahoma, 446 F. Supp. 844 (E.D. Tenn. 1978); Evans v. Fullard, 444 F. Supp. 1334 (W.D. Pa. 1978).

(footnote cont.)

similarly be necessary in the future. In consequence, the Church has a continuing interest in the development of the law in this area.

3. The Church seeks to engage in the activities described above in public places of many descriptions, including public college campuses and similar loci. If the novel views expressed by the petitioner in this case are held to constitute an accurate statement of the law, the Church and its members may be precluded by the establishment clause from engaging in their activities in places previously thought to be public fora in which conduct protected by the free speech and free exercise of religion clauses could not constitutionally be prohibited.

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*/ (continued)

See also, e.g., Heritage Village Church and Missionary Fellowship, Inc. v. State, 263 S.E. 2d 726 (N.C. 1980)(Unification Church an intervenor in action challenging state statute).

4. In particular, an organization affiliated with the Unification Church, the Collegiate Association for the Research of Principles [CARP] is situated similarly to the Cornerstone group and its members. The Church and CARP share many common members. Like Cornerstone, CARP is an organization of college students who seek to perform religious activities. CARP was founded in 1964 and is now in existence at more than 100 colleges and has more than 5,000 dedicated student members. CARP is dedicated to the propagation among students of the religious principles espoused by the Unification Church. The on-campus activities of CARP involve programs of religious content, which programs are sought to be carried out in many college campuses, both in exterior and interior areas thereof. If the petitioner's petition is permitted to stand, there would be an obvious and very substantial adverse effect on CARP and its members

and activities. Given the close association of CARP and the Unification Church, the latter is well situated to act to protect the interests of the former.

B. Reasons Why the Brief Amicus Curiae is Desirable.

5. As set forth above, the Unification Church is highly experienced in first amendment litigation involving the use of public fora. The Church participated on many occasions in actions involving questions similar to those of this case and has sought to contribute to the development of the law in this field. The Church's perspective on the theory of the public forum is a distinctive one, and it believes that the discussion contained in its Brief Amicus Curiae will be helpful to this Court by contributing to the presentation of a more complete view of the constitutional issues involved.

WHEREFORE, movant respectfully requests that it be granted leave to file

its Brief Amicus Curiae in this appeal.[1]

Dated: 29 May 1981

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[1] Consent of the respondents to file this brief was obtained. However, consent of the petitioner was not obtained.

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BRIEF AMICUS CURIAE.

SUMMARY OF ARGUMENT

The expression in which respondents wish to engage constitutes speech in a public forum. Content restrictions on expression in a public forum are anathema and have been implicitly rejected in the area of religious expression by many of this Court's precedents. Moreover, permitting religious expression in a public forum does not threaten the federal establishment clause, and state prohibitions of establishment cannot justify abridgment of an affirmative federal right.

ARGUMENT

I.

INTRODUCTION

The issue in this case is whether a religious student organization, Cornerstone, and its members may use generally available facilities at a public university for their meetings and other activities. While these respondents may be expected to argue highly cogent free exercise and freedom of expression claims amicus believes that the broader doctrine of free expression in public fora controls the case. The public forum doctrine[1] requires that all religious expression, not

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1/ While the concept of the "public forum came of age", Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233, 251, with this Court's decision in Grayned v. City of Rockford, 408 U.S. 104 (1972), it has been amplified and illustratively applied by the lower courts largely without further assistance. Consequently, amicus relies heavily herein on the now well-developed law of the public forum found in the caselaw of these courts, which is worthy of this Court's consideration.

merely that of the respondents, must be permitted to the same extent and degree as other varieties of expression, all of which are entirely appropriate on publicly owned property, particularly on a college campus such as the University of Missouri-Kansas City [the university], which is necessarily devoted to the exchange of ideas. See Healy v. James, 405 U.S. 169, 180-81 (1972)(college environs are peculiarly a marketplace of ideas).

Amicus contends that no establishment results from the exercise of religious expression in a public forum. Many, if not most, of the classic public forum decisions implicitly hold as much since they involved religious proselytization and expression. See, e.g., Kunz v. New York, 340 U.S. 290 (1951) (religious meeting held by Baptist minister); Lovell v. City of Griffin, 303 U.S. 444 (1938) (distribution of religious pamphlets and tracts). The time has now come, therefore, for this court to make explicit what was implicit in these decisions, that religionists enjoy

the same right of expression in public fora as do all other citizens. See McDaniel v. Paty, 435 U.S. 618, 640-42 (Brennan and Marshall, JJ., concurring).[1a]

1a/ The tenuous distinction offered by the university between religious speech and religious services, see Brief of Petitioners at 48-49, can be dismissed out of hand. Not only is the distinction conjured up from whole cloth, but if accepted would require for its enforcement a system of censorship of the type that this Court has long condemned. See Freeman v. Maryland, 380 U.S. 51 (1965); Cantwell v. Connecticut, 310 U.S. 296 (1940). Hence, no distinction among varieties of religious expression are necessary.

II.

RECOGNIZED PRINCIPLES OF FREEDOM OF EXPRESSION REQUIRE THAT RELIGIOUS EXPRESSION BE PERMITTED IN A PUBLIC FORUM ON THE SAME BASIS AS ALL OTHER EXPRESSION.

The government may not discriminate against religious expression [2] in a public forum [3] any more than it may discriminate against any other form of expression, see, e.g., Police Department v. Mosely, 408 U.S.

2/ "[R]eligious speech like other speech, is protected by the First Amendment." Chess v. Widmar, 635 F.2d 1310, 1315 (8th Cir. 1980) (footnote omitted), cert. granted, 101 S. Ct. 1345 (U.S. 1981).

3/ The term "public forum" was coined by Professor Kalven in his seminal article on speech in public places.

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made is an index of freedom.

(footnote cont.)

92 (1972); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)(Frankfurter, J., concurring), or than it may discriminate among varieties of religious expression, Fowler v. Rhode Island, supra at 67. See generally Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975). This Court has recognized as much by upholding the right to religious expression on various types of public property with never a thought of establishment.

For instance, a prohibition of preaching by any denomination in a federally owned village for defense workers could not prevent literature distribution by a minister of the

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3/ (continued)

Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 11-12. Professor Kalven's article aided the "safe delivery" of this first amendment doctrine which is now "a fully viable creation". L. Tribe, American Constitutional Law §12-21, at 688-89 (1978).

Jehovah's Witnesses for the simple reason that to do so would infringe upon the freedoms of press and religion. Tucker v. Texas, 326 U.S. 517, 520 (1946). A selective prohibition of religious expression fared no better. Saia v. New York, 334 U.S. 558 (1948), overturned the conviction of a Jehovah's Witness for giving amplified lectures on religious subjects without a permit because the delegation of uncontrolled discretion by the permit ordinance allowed it to be used as "a device for the suppression of free communication of ideas", id. at 562, in spite of a pointed reference to the establishment clause by a lone dissenter, id. at 569-70 (Jackson, J., dissenting).

Similarly, Niemotko v. Maryland, 340 U.S. 268 (1951), invalidated a conviction of a Jehovah's Witness for holding a "Bible talk" in a public park without a permit because of the lack of standards controlling the decision to issue or to deny permits with no mention of the establishment clause. The same result

was reached with regard to a Baptist "religious meeting" on the streets. Kunz v. New York, 340 U.S. 290 (1951). 4/ Another Jehovah's Witness case, Poulos v. New Hampshire, 345 U.S. 395 (1953), viewed with approval a New Hampshire Supreme Court decision that a blanket refusal to license religious services in public parks violated freedom of expression principles. Id. at 403-404. Finally, and of particular relevance to

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4/ Several other cases involving the use of the streets for religious proselytization are also worth noting because the religious nature of the activity was clearly recognized and, in fact, was strongly emphasized as the very reason that this use of the streets could not be proscribed. E.g., Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943) (activity of Jehovah's Witness colporteurs enjoys the same protection as worship in churches or preaching from pulpits); Jones v. City of Opelika, 316 U.S. 584, 620-23 (1942) (Murphy, J., dissenting), adopted per curiam as majority opinion, 319 U.S. 103 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303-04. Cantwell is especially noteworthy because, while it is the case which held the free exercise clause to be incorporated into the fourteenth amendment, "the court has subsequently understood Cantwell to . . . [have invoked] interests protected by the First Amendment's guarantee of freedom of speech". Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 629 (1980).

437 F. Supp. 666, 674 (W.D. Pa. 1977)(Greater Pittsburgh International Airport); International Society for Krishna Consciousness v. Engelhardt, 425 F. Supp. 176, 180 (E.D. Mo. 1977)(Kansas City International Airport); see International Society for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979) (Atlanta airports); International Society for Krishna Consciousness v. Lentini, 461 F. Supp. 49 (E.D. La. 1978)(New Orleans International Airport); International Society for Krishna Consciousness v. New York Port Authority, 425 F. Supp. 681 (S.D.N.Y. 1977)(three New York airports).[5/]

5/ These cases are representative of merely those which deal with "unconventional" fora and a concededly religious exercise such as sankirtan. Religious fund raising and literature distribution in the streets and from door to door have generated a host of other decisions which apply first amendment doctrine to activity recognized as religious in nature without distinguishing it from other activity protected by the first amendment. E.g., Love v. Mayor, 448 F. Supp. 128 (D. Wyo. 1978); Levers v. City of Tullahoma, 446 F. Supp. 884 (E.D. Tenn. 1978)(Unification Church); Tate v. Akers, 409 F. Supp. 978 (D. Wyo. 1976), aff'd,

(footnote cont.)

What all of these cases hold implicitly, that the government may not regulate the use of a public forum on the basis of the content of expression, other cases have declared in ringing terms.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfilment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, . . . [376 U.S. 254, 270 (1964)].
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> Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use

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5/ (continued)

565 F.2d 1166 (10th Cir. 1977)(Seventh day Adventist church); City of Anchorage v. Berry, 145 F. Supp. 868 (D. Alaska 1956) (Jehovah's Witness).

> to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," [A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)] and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Department v. Mosely, supra at 95-96 (citation and footnote omitted, emphasis added).

Moreover, "Mosely was neither the Court's first nor its last pronouncement that the First and Fourteenth Amendments forbid discrimination in the regulation of expression on the basis of the content of that expression". Carey v. Brown, 100 S. Ct. 2286, 2291 n.7 (1980). "[E]ven a traffic regulation cannot discriminate on the basis of content

unless there are clear reasons for distinctions." Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975).

> [W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, . . . and may even forbid altogether such use of some of its facilities, . . . what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression. . . .

Hudgens v. NLRB, 424 U.S. 507, 520 (1976) (citations omitted, emphasis in the original). 6/

6/ Another case in this line worthy of note is First National Bank v. Bellotti, 435 U.S. 765 (1978), in which this Court included churches among the examples of groups whose expression may not be regulated according to its content, id. at 785.

The university attempts to avoid this principle by arguing that it is not a public forum, that it is different in nature from the streets, parks, transportation facilities, and other public areas that have been held to be public fora. Brief of Petitioners at 44-46. The argument is essentially beside the point because the university has treated its buildings and grounds as suitable for other varieties of expression than religion. The question is not whether the university is a forum for all kinds of expression but rather whether one variety can be excluded.

Be that as it may, there is but one test for determination of a public forum.

> [D]oes the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. The factors to be considered are essentially the same, be the forum selected for expression a street, park, shopping center, bus terminal, or office plaza.

Wolin v. New York Port Authority, 392 F.2d 83, 89 (2d Cir.), cert. denied, 393 U.S. 940 (1968)(bus terminal)(footnote omitted, emphasis added). Accord, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972)(stating same standard for determining existence of public forum).

Nothing in the university's own description of its facilities even suggest that its meeting rooms are not an appropriate place for communication of views, not to mentioned its lawns and sidewalks. While "reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities", Healy v. James, 408 U.S. 162, 192-93 (1972), in order to prevent conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others", Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513 (1969), accord, Grayned v.

City of Rockford, supra at 118, are permissible, there would be no excuse for declaring the university off limits for expression.[7/]

The public forum formulation of Wolin and Grayned also refutes the university's contention that its primary purpose, "secular education", Brief of Petitioners at 44, 45 (emphasis in the original), is somehow a distinguishing factor. The critical question is whether a facility can accomodate expression without unduly impeding its primary function, and the university has demonstrated

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7/ In this respect, and in this respect only, special purpose public facilities differ from the classic public fora, the streets and the parks. For this reason Professor Tribe has dubbed "[p]ublic facilities like schools and libraries, created not primarily for public interchange but for purposes closely linked to expression, . . . as semi-public forums". L. Tribe, supra note 3, at 690. In the semi-public forums the government retains the "power to preserve such tranquility as the facilities' central purpose requires -- a power that would be denied in a true public forum -- but no power to exclude peaceful speech or assembly compatible with that purpose". Id.

that the answer is beyond all doubt in the affirmative by sanctioning other varities of expression. Like the streets, which after all have "primary purposes of passenger and vehicular traffic", Niemotko v. Maryland, supra at 282 (1951)(Frankfurter, J., concurring), the university campus has a constitutionally mandated secondary purpose of serving as a public forum.[8/]

The university has therefore abridged the respondent's affirmative right to freedom of expression guaranteed by the First Amendment. Apparently realizing as much, the

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8/ The assertion of the university that "cases dealing with areas traditionally received and considered as being open for" expression are somehow therefore distinguishable is hogwash. As Wolin and Grayned demonstrate, the status of a publicly owned place as a public forum stems from its character, not its history. "No longer does the right to effective freedom of expression . . . turn on whether the particular place at issue has historically been dedicated to the exercise of First Amendment rights." Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233, 241-52. See also Cass, First Amendment Access to Government Facilities, 65 Va. L. Rev. 1287, 1317-20 (1979). "The important question is not the character of the property, but the character of its use. . . ." Chess v. Widmar, supra at 1318.

university does not really deny that the first amendment is plainly offended. Instead, the university devotes most of its energies to an attempt to demonstrate "that its action is necessitated by governmental interests of the highest order", First National Bank v. Bellotti, supra at 786, compliance with the dictates of the state and federal establishment clauses. For the sake of clarity, therefore, this straw man is separately analyzed in the following section.

III.

SIMPLE RELIGIOUS EXPRESSION UPON STATE PROPERTY DOES NOT CONSTITUTE AN ESTABLISHMENT OF RELIGION.

The long-recognized purpose of the establishment clause of the federal constitution is to mandate governmental neutrality in all involvement with matters of religion.

> Government, in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968)(footnote omitted). Because the clause is thus synonymous with neutrality, it is violated by, but only by, "financial support, and active involvement of the sovereign in

religious activity" which amounts to "sponsorship by the sovereign. . . ." Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

Consequently, the few cases [9/] in which the university's theory that regular use of its facilities for religious purposes would constitute an establishment, has been presented in any guise have soundly rejected it. For

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9/ Of the numerous cases cited by the university only two of them involve an analogous problem of voluntary religious expression in an arguably public forum. These decisions, Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), cert. denied, 434 U.S. 877 (1977), and Brandon v. Board of Educ., 487 F. Supp. 1219 (N.D.N.Y.), aff'd, 635 F.2d 971 (2d Cir. 1980), petition for cert. filed, No. 80-1396 (U.S. Feb. 17, 1981), both involved high schools rather than colleges or universities and, whatever their merits, are therefore distinguishable for the reasons stated by the Eighth Circuit.

> This case is also distinguishable from those that involved the requested use of classrooms for prayer or Bible study by high school student groups. . . . First, high school students necessarily require more supervision than do young adults of college age and this supervision necessarily poses a greater risk of entangling governmental authority in

(footnote cont.)

instance, a ban on the conduct of a Catholic Mass in the commons room of a university dormitory was rejected both by the Delaware Chancellor and by the Delaware Supreme Court.

> [W]e hold that the University cannot support its absolute ban on all religious worship on the theory that, without such a ban, University policy allowing all student groups, including religious groups, free access to dormitory common areas would necessarily violate the Establishment Clause. The Establishment cases decided by the United States Supreme Court indicate that neutrality is the safe harbor in

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9/ (continued)

> religious issues. Teachers ordinarily assigned to assist and supervise high school student groups may be thrust into an untenable position when assigned to supervise a prayer group. Even their presence in the room may suggest governmental approval of the religious activities of the group. There is no evidence in the record before us, however, that Cornerstone or any other student group at UMKC receives supervision or assistance from any member of the University's faculty.

Chess v. Widmar, 635 F.2d 1310, 1319-20 (8th Cir. 1980), cert. granted, 101 S. Ct. 1345 (U.S. 1981). Accord, Brandon v. Board of Educ. supra, 635 F.2d at 980.

> which to avoid First Amendment violations: neutral "accomodation" of religion is permitted, Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947); Zorach v. Clauson, . . . while "promotion" and "advancement" of religion are not. McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948); Abington School District v. Schempp, . . . University policy without the worship ban could be neutral towards religion and could have the primary effect of advancing education by allowing students to meet together in the commons room of their dormitory to exchange ideas and share mutual interests. If any religious group or religion is accommodated or benefited thereby, such accomodation or benefit is purely incidental, and would not, in our judgment violate the Establishment Clause. Tilton v. Richardson, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971). The commons room is already provided for the benefit of the students. It is not a dedication of the space to promote religious interests. Therefore, in regard to the Establishment Clause, we agree with the view taken by the Court of Chancery.

Keegan v. University of Delaware, 349 A.2d 14, 15 (Del.), rev'g on other grounds, 318 A.2d 135 (Del. Ch. 1974), cert. denied, 424 U.S. 934 (1975).

Similarly, Pratt v. Arizona Board of Regents, 110 Ariz. 466, 520 P.2d 514 (1974), held that a lease of public stadium facilities to evangelist Billy Graham for religious services did not violate the establishment clause of the Arizona Constitution which provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment". The Arizona Supreme Court held that

> The lease . . . does not place the power, prestige, or approval of the State of Arizona State University behind the religious beliefs of the lessee, nor connote favor by the State for Reverend Graham over any other religious group with the money to lease the stadium.

Id. at 469, 520 P.2d at 517.

Likewise, the late Judge Wollenberg rejected out of hand a similar argument with the basic purpose of the establishment clause.

> The Court feels that the defendant has misread the cases in which the Supreme Court has explored and delineated the scope of the

establishment clause. Those cases recognize that the division between church and state cannot be complete: "It is equally well established, however, that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973). Rather, the Court has determined that a law challenged on establishment grounds must be analyzed in light of whether it furthers the central problems against which the Clause protects; primary among those problems include the sponsorship, financial support, and active involvement of the sovereign in religious activity." 413 U.S. at 772, citing Walz v. Tax Commission, 403 U.S. 664, 668 (1970); Lemon v. Kurtzman, 403 U.S. at 612. The establishment clause seeks to insure governmental neutrality "between religion and religion, and between religion and nonreligion." Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

A policy allowing all speakers access to [California] D[epartment of]M[otor] V[ehicles] grounds, subject to reasonable regulation, would maintain the proper neutrality with respect to religion. The policy would clearly have the useful secular purpose and effect of encouraging the expression of ideas on all subjects of interest.

> Implementation of such a policy would not involve government sponsorship, financial support, or active involvement in religious activity, the problems emphasized in most establishment cases. In that the policy would benefit all speakers, as well as the public, the benefit of one particular group must be considered to be incidental.

Jaffe v. Alexis, No. C-79-1229 ACW, slip op. at 6-7 (N.D. Cal. Aug. 13, 1979)(Order Granting Injunctive Relief), appeal filed, No. 80-4022 (9th Cir. Jan. 11, 1980).

The District of Columbia Court of Appeals has also rejected the religious-speech-as-establishment theory. O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979). A close parsing of that decision is appropriate because it demonstrates the operation of the principles governing speech in the public forum, which control this case as well.

O'Hair, which rejected an establishment clause challenge to a permit for the Pope to celebrate Mass on the National Mall in Washington, D.C., rests upon two central holdings. First, in the absence of a prefer-

ence for religious expression over other varieties, there is no establishment.

> When the National Mall is, by a matter of established policy, openly available on a non-discriminatory basis to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to all others (religionists and anti-religionists), there is no "establishment of a religion," and there cannot be a meaningful perception of one.

Id. at 934 (footnote omitted, emphasis in the original).

Second, the de minimus aid that a church or religious exercise may receive from non-discriminatory access to a public forum constitutes mere accommodation, [10/] not establishment.

10/ Accommodation of religion may go far indeed if religion is not singled out for special favoritism and is merely one of several activities accommodated and if religion is not subsidized. See Walz v. Tax Comm'n, supra at 672-74. For example, long term leases of land for use as chapels at publicly-owned John F. Kennedy Airport do not constitute an establishment. Brashich v. Port Auth., 484 F. Supp. 697, 703-04 (S.D.N.Y. 1979), aff'd, 628 F.2d 1344 (2d Cir. 1980)(table).

> Theoretically, any government aid indirectly frees religious resources to be put to sacred ends. The Court has recognized however, that prohibiting all assistance would mean that "a church could not be protected by the police and fire departments, or have its public sidewalks kept in repair." Roemer v. Board of Public Works, 426 U.S. 736, 747, 96 S. Ct. 2337, 2345, 59 L. Ed. 2d 179 (1976). That, of course, is not the law.

Id. at 935.

Consequently, there is simply no constitutional objection to religious speech in the public forum.[11/] "This principle that

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11/ Although the university attempts to find solace in the concurring opinion in O'Hair, Brief of Petitioners at 48, there is none to be found. The concurring opinion merely notes that regular use of the National Mall by any group is prohibited by the park regulations and that therefore no problems of equation of the park with a church, the shrill cry of the plaintiff, was even possible. O'Hair v. Andrus, supra at 938 (MacKinnon, J., concurring); cf. Saia v. New York, 374 U.S. 558 (1948)(series of religious lectures in public park; claim of dissent that establishment would result was ignored). The concurring opinion then goes on to directly refute the contention of the university that religious expression on public property demonstrates approval of its content. O'Hair v. Andrus, supra at 938.

some use of public property for a religious service may occur without constituting an "establishment" of religion is not confined to emergencies. . . . The legitimacy of non-discriminatory, voluntary religious exercises in parks is plain. . . ." Id. at 937. 12/

Even in the context of the use of public school buildings, 13/ the impropriety of state promotion of the message to be expressed has been specifically rejected as a reason for discriminatory regulation of the use of a public forum. For example, under

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12/ "Judge Leventhal's scholarly opinion in O'Hair" was relied upon by the Eighth Circuit to illuminate "[t]he fine line between impermissible governmental aid to religion and the neutral accommodation of religious groups' First Amendment rights. . . ." Chess v. Widmar, supra at 1318.

13/ The fear that the public schools may be used as vehicles for the advancement of religion is both deep and widespread and has generated both constitutional restrictions, see, e.g., Cal. Const. art. IV, §8 (prohibition of direct or indirect sectarian or denominational instruction or teaching), and a substantial body of caselaw, see e.g., Engel v. Vitale, 370 U.S. 421 (1962) (New York Regents'

(footnote cont.)

pressure from the Department of Health, Education and Welfare, a local school board rescinded an earlier policy which allowed its facilities to be used outside school hours by all comers and instead adopted a policy which excluded from them groups which advocate racial discrimination including, of course, the Ku Klux Klan. On appeal, the Fifth Circuit first quickly rejected an argument that allowing KKK use would impede desegregation and then turned to an argument that, by allowing use of its facilities, the school board would somehow "involve" itself with the views of the KKK.

> A more logical concern is that the state, in the person of the Board, might be seen as acting to forward KKK's views and policies by permiting any use of its facilities

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13/ (continued)

prayer led by public school teachers declared unconstitutional).

> by such an organization. It is certainly true that significant state action in support of such things is prohibited. . . . But the weight of authority seems to be that merely permitting the occasional and temporary use of state facilities by racially discriminatory groups along with all others does not constitute significant state involvement in their practices.

Knights of the Ku Klux Klan v. East Baton Rouge, Parish School Board, 578 F.2d 1122, 1127-28, (5th Cir. 1978)(emphasis in the

original). [14/] Accord, National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973)(analogizing the use of a public forum by organization advocating racial discrimination to providing police and fire protection for churches); Danskin v. San Diego Unified School District, 28 Cal. 2d 536, ___, 171 P.2d 885, 892 (1946) ("Censorship of those who would use the school building as a forum cannot be rationalized by reference to its setting.").

The argument of the university to the contrary is based upon a simplistic application of the three-part test for the presence

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14/ The observation of the court that state action in support of the views of the KKK is "certainly" prohibited rebuts any argument that there are restrictions upon government in its relationship with the exercise of religion which are not imposed upon it in its relationship with other types of speech. Neutrality of the government in the regulation of a public forum, see, e.g., Police Dept. v. Mosely, 408 U.S. 92 (1972), is as essential as it is in the regulation of religious activity, see, e.g., Epperson v. Arkansas, supra.

of an establishment of religion enunciated by Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I), and its progeny. On analysis, no prong of the test is violated; indeed, no one of them is even casually touched.

First, as the Eighth Circuit observed, a policy that permitted equal use by the plaintiffs as well as others of the university property as a public forum would "reflect a clear secular purpose" of encouraging the expression of ideas on all subjects of interest". Chess v. Widmar, 480 F. Supp. 907, 919 (W.D. Mo. 1979), quoted with approval, id., supra at 1315. Whether the prohibition that the university seeks to impose is defined in terms of all religious expression or in terms of only religious worship, the fact that the use of the forum by religious groups would not be exclusive but would be in common with political and cultural groups seeking to spread their message to the

university community cannot be gainsaid.

Second, the effect of non-discriminatory policy for use of the university facilities would neither advance nor inhibit either religion or non-religion. The university argument to the contrary relies upon reliance upon the actual indirect and remote financial aid which even the sporadic use of public property entails and the appearance of sponsorship and endorsement. But neither of these thin reeds withstands analysis.

In a world in which the environmental axiom that everything affects everything else is now widely recognized, an "effect test is inescapably one of degree". Walz v. Tax Commission, 397 U.S. 664, 674 (1970)(entanglement branch of three-prong test). "The crucial question is not whether some benefit accrues to a religious institution . . . , but whether its principal or primary effect advances religion." Tilton v. Richardson, 403 U.S. 672, 679 (1971)(emphasis added)

(holding financial assistance to church-related colleges and universities constitutional).

Policies which primarily serve a secular end such as public safety, secular education, and the encouragement of public service activities have therefore been found to be constitutional even though they incidently resulted in tangible benefit to religions in the form of bus transportation, textbooks, and tax exemptions. All of these incidental benefits gave aid to religion because

> all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968); Walz v. Tax Comm'n, supra.

Id.

Here, the assistance to any religion which chooses to temporarily appropriate

university property for use as a public forum is de minimus at best. The "subsidy" that such groups would receive is no greater than that received by the Catholic Church when it used the National Mall for a Mass by the Pope, O'Hair v. Andrus, supra, or by the Jehovah's Witnesses who used a small park in a small city, "public tax-supported property", Saia v. New York, supra at 569 (1948)(Jackson, J., dissenting), in order to spread their faith. Indeed, the subsidy provided by use of the university sidewalks and buildings for religious purposes is qualitatively no different from and quantitatively no greater than that provided by the use of the sidewalks and streets of a city for that purpose, see, e.g., Kunz v. New York, 340 U.S. 290, 293 (1951) (Baptist "religious meeting" on public streets). Such "minimal" financial support does not an establishment make. See Chess v. Widmar, 635 F.2d at 1317.

In fact, no subsidy in a legal sense exists in either any of the cited cases or in this one. Instead, by providing public property which may be commandeered for use by members of the public, including those with messages on the subject of religion, the government provides a "general government service" analogous to police and fire protection, sewers, and highways, which have never been so much as suspected of presenting establishment problems even though they are provided to churches. Everson v. Board of Education, 330 U.S. 1, 17-18 (1947). The reason is, simply enough, that to exclude churches or religious believers or both from generally available benefits and services would penalize religious belief and transform the government from a neutral by-stander vis-a-vis religion to its adversary and would thus violate the first amendment. See id. at 18, Chess v. Widmar, 635 F.2d at 1317 (singling out religious speech for prohibition discredits and inhibits it and therefore

violates establishment clause).

Apparently conscious of the matchstick strength of this portion of its effect argument, the university also argues that an appearance on sponsorship would result from the presence of religious expression on its campus. But other than pointing to the natural desire of Cornerstone not to be stigmatized as a pariah, the university is unable to point to any evidence or authority that its imprimatur would be placed on the respondents. That equation is one that the Saudi Arabian government might make between American public television and a program offensive to the Saudis that the network finds worthy of broadcasting, but it is not one which someone more familiar with the expressive tumult of a free society is likely to make.

> Properly analyzed, there is simply no state involvement here in . . . ideas or practices, whatever they may be, and no state action endorsing them. For here, the decisive action of the state was an indifferent

> one, analogous to dedicating a public park: it threw open the doors . . . for . . . use by all comers, on a first-come, first-serve basis. Thereafter, its only additional function was the housekeeping one of scheduling -- determining who came first to apply for a particular time. . . . Thus, the state is here no more involved in or responsible for the views expressed or for the composition of the groups which expressed them in the forum which it created than the United States is in who makes speeches or holds demonstrations on the Mall.

Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, supra at 1128 (emphasis in the original, citation omitted); see Chess v. Widmar, 635 F.2d at 1317 (speaker sponsors ideas, not the forum itself).

Even more closely in point is the short shrift that the contention of the university was given in O'Hair.

> Appellants say that the government permit for this occurrence on the renowned National Mall sends an implied message -- to the nation and to the world -- of government approval (and therefore "establishment") of this church service. It implies no more approval for this church

> than for any other group using the Mall. The message that it does send the world is approval of the principles of freedom of demonstration, for all groups, for all religions, even for those opposing religion.

O'Hair v. Andrus, supra at 936.

But even were there a factual predicate for the identification argument, it would avail the university nought since a less restrictive alternative to the total proscription of religious expression exists that would obviate the perceived problem. Because of the vital interest of society as a whole in free and open communication of ideas, if any means of achieving a state purpose less restrictive of the avenues of communication exists than the one in question, that alternative must be adopted, no matter how important the state interest may be. The government must prove that nothing less than the restriction it seeks to defend would serve a compelling state interest. Wright v. Chief of Transit Police, 558 F.2d 67, 68 n.1 (2d 1977).

> Since there is a presumption against restraints on first amendment freedoms, the specific means of regulating or limiting those freedoms must be the least restrictive ones possible and needed to accomplish the compelling public purpose. It is not constitutionally adequate or acceptable to show that the particular means selected are one rational way of achieving the government purpose. The burden is on the government to demonstrate that the chosen means are the minimum restrictive ones necessary.

United States v. Silberman, 464 F. Supp. 866, 873 (M.D. Fla. 1979). See Kusper v. Pontikes, 414 U.S. 51, 59 (1973)(if less drastic method available to achieve state end, scheme that boradly stifles individual liberty may not be chosen); A Quaker Action Group v. Morton, 516 F.2d 717, 726 (D.C. Cir. 1975)(restriction must be no greater than essential); Jeannete Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575, 584-85 (D.D.C.)(same), aff'd mem., 409 U.S. 972 (1972).

Moreover, the less restrictive alternative need not be equally as effective as the one which the state seeks to defend.

Scheider v. New Jersey, 308 U.S. 147 (1939), held unconstitutional three ordinances that prohibited distribution of pamphlets and handbills on the public streets that were defended as measures aimed at preventing litter. Despite the notorious fact that prosecution of litterers is a rare event and that the fear of prosecution for littering deters almost no one (as a casual observation of any urban street will confirm), nonetheless this Court held that the solicitude of the first amendment for literature distribution "does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets". Id. at 162.

Similarly, Cantwell v. Connecticut, 310 U.S. 296 (1940), held that a licensing scheme that "merely safeguards against the perpetration of frauds under the cloak of religion", id. at 304, is offensive to the first amendment because the hit-or-miss alternative of

criminal prosecution could achieve this goal. "Certainly penal laws are available to punish such conduct." Id. at 306. Accord, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).

As the court concluded in Schneider, even though the less restrictive means may be "less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated . . . , and who may import the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press". Schneider v. New Jersey, supra at 164. Accord, Village of Schaumburg v. Citizens for a Better Environment, supra at 639.

The less drastic means in this case is both simple and obvious. If the university fears that the appearance of sponsorship will result from the presence of religious expression on its property, "prominently placed disavowals could be posted that would entail

a less onerous means of dealing with the problem than banning all such speech". Jaffe v. Alexis, supra at 7.

As this Court recently observed, the university could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers [or worshippers] stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of . . . law". Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035, 2044 (1980).[15/]

In sum, religious expression cannot be

15/ The university also advances an entanglement argument which, other than restating its subsidy argument in another form, consists of an assertion that competition for use of its facilities with other groups would create divisiveness. Suffice it to note that that problem could easily be solved with a neutral allocation system, such as first-come, first-served, and in that it is in no way different from the same problem of policing the use of a forum that exists in areas in which even the university concedes that religious expression is permissible. In essence, all that the university can muster in support of its divisiveness argument is "undifferentiated

(footnote cont.)

prohibited from a public forum absent a compelling state interest. Avoiding an establishment cannot possibly qualify as such an interest since no portion of the three-part establishment test is violated by the absence of such a prohibition.

15/ (continued)

fear and apprehension". Tinker v. Des Moines, Independent Community School Board.

IV.

COMPLIANCE WITH STATE CONSTITUTIONAL MANDATES CANNOT JUSTIFY CONTRAVENTION OF THE FEDERAL FIRST AMENDMENT.

The university appears to have the temerity to suggest that compliance with Missouri constitutional provisions, Mo. Const. art. I, §§6-7; id. art. IX, §8, somehow excuses its trampling on plaintiffs' federal first amendment rights. Brief of Petitioners at 36-42. This argument cannot be taken seriously in light of the supremacy clause, U.S. Const. art. VI, cl. 2.

No matter what the state constitution may say, even were it to declare in so many words that "no one shall ever so much as breathe the name of God on state property", the first amendment would still be the law of the land, "anything in the constitution

or laws of . . . [the] state notwithstanding". Id. (capitalization modernized, emphasis added). For this reason this Court has held unconstitutional a state constitutional provision that disqualified ministers from serving as legislators because it abridged their federally guaranteed rights to free exercise of religion, McDaniel v. Paty, 98 S. Ct. 1322 (1978), a state constitutional provision which required an oath of theistic belief as a requirement to hold public office because it abridged freedom of belief and religion, Torcaso v. Watkins, 367 U.S. 488 (1961), and a state constitutional provision forbidding fair housing laws because it denied equal protection of the laws in contravention of the fourteenth amendment, Reitman v. Mulkey, 387 U.S. 369 (1967), aff'g 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1967). If the Missouri constitution does indeed forbid simple religious expression on public property, it deserves the same fate.

Because the Missouri Constitution cannot constitute a compelling state interest[16/] that would justify restricting religious expression, access to the university facilities

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16/ The university's concern for establishment is understandable given the genesis of the Missouri constitutional provisions it seeks to vindicate but is sadly misplaced. Both the Missouri Constitution relied upon in this case, Mo. Const. art. I, §§6-7, id. art. IX, §8, and the Washington Constitution, art. I, §11 and art. IX, §4, which was relied upon in a similar action, Dittman v. Western Washington University, No. C 79-1189 V (W.D. Wash. Feb. 27, 1980), appeal docketed, No. 80-3120 (9th Cir.), specifically prohibit state monetary aid for any church or religion. Both constitutions date from the latter half of the Nineteenth Century, an era in which public schools were dominated by a "pan-Protestant" ideology, see L. Pfeffer, God, Caesar and the Constitution 170-73 (1975). Because of the bias of the public schools, the Catholic parochial school system flourished, id. at 230, while proposals to provide it with public funding on an equal footing with the Protestant dominated public schools were defeated. At the same time stringent prohibitions of financial aid to parochial schools were adopted. Id. at 259. These provisions became known as "Blaine Amendments" after a defeated federal constitutional amendment to the same effect offered by Senator Blaine, H.R. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 5190 (1876).

By themselves these constitutional provisions are beyond reproach and do not deny

(footnote cont.)

for Cornerstone and its members is simply a prime example of that "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference". Walz v. Tax Commission, supra at 669. Permitting, even encouraging, the religious activities envisaged by plaintiffs therefore "follows the best of our traditions". Zorach v. Clauson, 343 U.S. 306, 314 (1952)(Douglas, J.).

16/ (continued)

equal protection of the laws merely because they deny a benefit to religious school students granted to their public brethern. Brusca v. Missouri ex rel. State Bd. of Educ., 332 F. Supp. 275 (E.D. Mo. 1971), aff'd, 405 U.S. 1050 (1972). But where the federal constitution creates an affirmative right such as free exercise of religion, the state constitution would necessarily have to be qualified, see Weiss v. Bruno, 82 Wash. 2d 199, 206 n. 2, 509 P.2d at ___, n.2 since "of course the supremacy clause of the federal constitution not even a state constitutional prohibition can overcome such an expression of a federal constitutional right". [1977] Wash. Op. Att'y Gen. No. 11, at 15 (footnote omitted, emphasis in the original). Thus, the vice of the state positions in these cases is that they rely upon a state created establishment perspective and analysis at the expense of federal constitutional rights.

V.

CONCLUSION

Not long ago two justices of this Court summarized the constitutional principles which directly contradict the argument that religious speech on public property constitutes an establishment.

> Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations and that each sect is entitled to "flourish according to the zeal of its adherents and the appeal of its dogma." Zorach v. Clausen, 343 U.S. 306, 313 (1952). Accordingly, religious ideas, no less than any other, may be the subject of debate which is "uninhibited, robust, and wide-open", New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Government may not interfere with efforts to proselytize or worship in public places. It may not tax the dissemination of religious ideas. It may not seek to shield its citizens from those who would solicit them with their religious beliefs.
>
> . . .
>
> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religius divisiveness and strife does not rob it of constitutional

> protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).
>
> . . .
>
> In short, . . . [r]eligionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood is a shield against any attempt by government to inhibit religion as it has done here. . . . It may not be used as a sword to justify repression of religion or its adherents from any aspects of public life.

McDaniel v. Paty, 435 U.S. 618, 640-42 (1978) (Brennan and Marshall, JJ., concurring)(footnotes and some citations omitted, emphasis added).

For the reason stated by Justices Brennan and Marshall as well as for the reasons discussed herein, religious expression on public property without a good deal more does not constitute an establishment. Accordingly, the judgment of the Eighth Circuit should be affirmed.

Dated: 29 May 1981

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No. 80-689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS ON BEHALF OF THE NATIONAL ASSOCIATION OF EVANGELICALS

AND

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF EVANGELICALS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS ON BEHALF OF THE NATIONAL ASSOCIATION OF EVANGELICALS

The National Association of Evangelicals (NAE), pursuant to Supreme Court Rule 36.3, hereby moves for leave to file a brief as *amicus curiae* in support of the respondents in this case and for affirmation of the decision of the United States Court of Appeals for the Eighth Circuit. The respondents have consented to the filing of this brief and their letter of consent has been filed with the Clerk pursuant to Rule 36. The motion is necessitated by petitioners' refusal to consent to the filing of the appended brief.

NAE is a major national interest group of evangelical Christians dedicated to strengthening the ministry of the local church. Its members include state and local evangelical

organizations, colleges and universities and some 36,000 churches from 74 national denominations (with a constituency of approximately 3.5 million people). NAE has a number of affiliates with a service constituency in excess of 10 million persons worldwide.

NAE's affiliates include the National Religious Broadcasters, the World Relief Corporation, an organization that administers to the needy and the poor of the world, and the Evangelical Foreign Mission Association, whose members include such campus-related groups as Campus Crusade for Christ, International, the Navigators, and Youth for Christ, International. In addition, NAE has established regular liaison with other evangelical youth and campus-related groups and associations, including Inter-Varsity Christian Fellowship, Young Life, Teen Challenge, and International Students, Inc. Most of these groups have locally-affiliated student members meeting on hundreds of public and private college and university campuses across the Nation and will be directly affected by the decision of the Court in this case.

NAE has represented its members' interest in matters before the courts, the United States Congress, and the Executive Branch. This representation constitutes a significant aspect of NAE's activities in matters where governmental action directly affects the ministry and mission of the local church and NAE's affiliates, related groups and individual members.

The issues presented in this case concern the rights of individuals to express their religious ideas on the public university campuses of our Nation. These rights have been exercised by students since the founding of our Nation. Thomas Jefferson and James Madison, the Framers of the First Amendment, in their official capacities as Rector and Member of the Board of Visitors, respectively, of the University of Virginia, expressly approved the rights of students

to meet for religious worship and teaching at the public University of Virginia. The decision of the District Court in this case to prohibit such meetings, if sustained, will result in an unparalleled denial of individual freedom in this country. This matter is of direct importance to the activities of members of NAE affiliates and related groups whose student members have heretofore been permitted to use public university facilities for self-directed, voluntary religious meetings on the same basis as other campus student groups.

It is the position of NAE that the decision of the Court of Appeals was correct in finding that the students' rights of Free Speech and Free Exercise were denied by the District Court's ruling and that the State's action constituted a violation of the Establishment Clause. In this regard, NAE wishes to bring to this Court's attention certain historical information concerning the views of Thomas Jefferson and James Madison with regard to the Establishment Clause and its application to student religious meetings on public university campuses. In addition, NAE wishes to comment on the District Court's holding that a neutral "open forum" policy at the university would constitute an Establishment of Religion. Finally, NAE wishes to express its views concerning the Court of Appeals' ruling that the State's action reflected hostility to religion and thereby violated the Establishment Clause. This latter holding is particularly noteworthy in view of the underlying purposes of the Establishment Clause and the manner in which public officials, unfamiliar with the law as interpreted by this Court, are using the Establishment Clause as a weapon formed against religious exercise in this country. The perspective of NAE and its affiliates on these particular issues goes beyond that of respondents in this respect.

For these reasons and those stated in the annexed brief, it is respectfully requested that the motion of NAE for leave

to file this brief as *amicus curiae* in support of respondents be granted.

Respectfully submitted,

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Dated: May 27, 1981

QUESTIONS PRESENTED

Regulation 4.0314.0107 of the public university system of the State of Missouri, which prohibits the use of university facilities and grounds by recognized campus organizations for purposes of religious worship and teaching, violates the rights of respondent students under the First and Fourteenth Amendments of the United States Constitution in that:

(i) the historical evidence indicates that the Framers never intended for the Establishment Clause to be applied to the fact situation found in the present case;

(ii) the Regulation is a law respecting the establishment of religion prohibited under the Establishment Clause;

(iii) the Regulation abridges the respondents' rights to Free Speech, Free Association and Free Exercise of Religion and denies respondents' rights to Equal Protection of the Law.

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IN THE

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF EVANGELICALS

INTEREST OF AMICUS CURIAE[1]

The National Association of Evangelicals (hereinafter "NAE"), located in Wheaton, Illinois, is a non-profit religious corporation and association of state and local evangelical organizations, colleges and universities and some 36,000 churches from 74 national denominations (with a constituency of approximately 3.5 million people) dedicated to strengthening the ministry of the local church.

[1] The respondents have consented to the filing of this brief and their letter of consent has been filed with the Clerk pursuant to Rule 36. The petitioners have withheld consent to the filing of this brief and that action is the subject of a Motion for Leave to File, timely presented, in accordance with Rule 42 of the Rules of the Supreme Court.

NAE has a number of affiliates with a service constituency in excess of 10 million persons worldwide. These affiliates include the National Religious Broadcasters, the World Relief Corporation, an organization that administered in excess of 14 million dollars of aid to the needy and the poor of the world in 1980, and the Evangelical Foreign Mission Association, whose members include such campus-related groups as Campus Crusade for Christ, International, the Navigators, and Youth for Christ, International. In addition, NAE has established regular liaison with other evangelical youth and campus-related groups and associations, including Inter-Varsity Christian Fellowship, Young Life, Teen Challenge, and International Students, Inc. Most of these groups have locally-affiliated student members meeting on hundreds of public and private college and university campuses across the Nation and will be directly affected by the decision of the Court in this case.

The State of Missouri acting through officials of its State University has unlawfully interfered with individual freedoms which have existed in this country for over 200 years. NAE is deeply concerned about the serious consequences that will flow from the Court's decision. At stake are precious liberties underlying the founding of our Nation. The essence of the freedom of those who profess religious beliefs and wish to express and exercise those beliefs as guaranteed by the First Amendment is threatened in a frightening way in this case.

Counsel for NAE have specialized in constitutional litigation, including the Religion Clauses of the First Amendment. Counsel John W. Whitehead has participated in numerous cases involving the Religion Clauses, serving as special constitutional consultant for the Center for Law and Religious Freedom of the Christian Legal Society, and has authored several books and law review articles that

focus on the interpretation and application of the First Amendment Religion Clauses. NAE believes the combined expertise of its Counsel will be of assistance to the Court. Therefore, this brief is filed to provide the Court with the view of *amicus curiae* on certain legal and historical aspects of this case which to date have not been adequately addressed by the parties.

STATEMENT OF FACTS

NAE adopts by reference the Statement of Facts as set forth in respondents' brief filed with this Court. NAE, however, emphasizes that this is not a situation where non-students are attempting to invade a university campus and force their views upon others. Instead, this case factually concerns the attempt by a group of tuition-paying students at the University of Missouri-Kansas City to meet and associate concerning the religious views they hold in common, and the efforts of the State to stop such meetings.

The respondent-students seek to enjoin the enforcement of the State University's Regulation No. 4.0314.0107 (the "Regulation") which prohibits the voluntary, extracurricular use of campus buildings for student religious meetings. The Regulation specifically bans the use of University facilities by student or non-student groups for religious worship or teaching. The policy extends to all University grounds, including the University lawn, with the only exception being University chapels (of which there are none at its Kansas City campus), provided that such use is only on an iregular basis. Respondent-students are members of an officially recognized student group and seek to exchange ideas, religious or otherwise, on the basis of the same privileges granted to other student groups at the University. The

State, however, has denied these rights, curtailing priceless First and Fourteenth Amendment guarantees.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed solely to the historical background of the Establishment Clause issues raised in this case and whether the State's prohibition against the religious practices in question in fact constitutes a violation of the Establishment Clause.

SUMMARY OF ARGUMENT

In prior cases, this Court has relied upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the Framers had a different understanding of the degree to which State action constituted "a law respecting the Establishment of religion" from that advanced in the early decisions of this Court reflecting on the Establishment Clause. First, it is clear that the climate of the revolutionary period was fundamentally religious and favored government accommodation of religious belief and expression, provided there was no active state sponsorship of any particular religion sect or practice. Moreover, there is important evidence indicating that Thomas Jefferson and James Madison specifically approved of regular religious meetings for worship and teaching by students on public university campuses. This experience of the Framers from Virginia cannot be discarded when, as this Court has recognized, they played such a leading role in shaping the Constitutional guarantees of religious freedim. The record is clear that the Framers would not have sanctioned the State Regulation in question here.

In addition to this historical evidence, it is evident that the State Regulation is hostile to religion and favors nonreligion over religion. In this respect, the Regulation is violative of the Establishment Clause. It serves no valid secular purpose. Its primary effect is to inhibit and interfere with religious thought and expression. By closing the campus to voluntary student religious meetings, ostensibly for meritorious reasons, the State has disparaged religion and placed its adherents at a very real and distinct disadvantage, both in the individual expression of their religious views and beliefs and as a group in relation to proponents of nonreligious thought and expression. Finally, the Regulation poses the very serious threat of excessive entanglement by State intervention in regulating and monitoring religious thought and expression, As the Court of Appeals correctly recognized, this hostile State policy must not be permitted to stand.

I.

The District Court's Decision That Voluntary Student Religious Meetings On Campus Violated The Establishment Clause Was In Direct Conflict With The Intentions Of The Framers Of The United States Constitution As Expressed In The First Amendment.

A. The Historical Background Of The First Amendment.

From this country's inception, the state and its educational institutions have encouraged and accommodated the practice of religion. From the references to the "Creator" in the Declaration of Independence to the drafting of the First Amendment, it is clear, in the words of the late Judge Charles Fahy, that "[t]he climate of the American revolutionary period, including the period of constitutional devel-

opment, was fundamentally religious." Fahy, *Religion, Education and the Supreme Court,* 14 Law & Contemp. Prob. 73, 77 (1949). The promotion of religious expression and freedom was of paramount concern to the Framers of the Constitution and, as they saw it, to the health of the Nation. This concern was clearly expressed in the passage of the Northwest Ordinance of 1787 by a Congress composed of many of the drafters of the First Amendment and the Constitution. It reads:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory. Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Ord. of 1787, Jul. 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927).

The focus of the revolutionary period was not the eradication of religion from the public schools or public life. Instead, it was to ensure that religious exercise be accommodated. As Professor Arthur Sutherland has written, the history of church and state reveals "an intimate association between government and religion. . . ." Sutherland, *Due Process and Disestablishment,* 62 Harv. L. Rev. 1306, 1318 (1949). Justice Joseph Story, who served on the United States Supreme Court from 1811 to 1845, wrote of this intimate relationship:

> Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so

> far as was not incompatible with the private rights of conscience and the freedom of religious worship. Any attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

J. Story, 2 *Commentaries of the United States* (2d ed., 1851) 593-95.[2] The Framers of the First Amendment therefore, never intended a complete separation of church and state. Interestingly, that has never occurred. If the intentions of the Framers are ignored, then, as Justice Douglas predicted:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so held me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Zorach v. *Clauson*, 343 U.S. 306, 312-13 (1952). The same might be said of the higher law of the Ten Commandments etched in marble in the Chamber of this Court directly above the seat of the Chief Justice. The predominantly religious orientation and history of the American people mitigates against such hostility toward religion. Any

[2] Justice Story's construction has been corroborated by others. T. Cooley, *Principles of Constitutional Law* 224 (1893); Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 Tex. Tech L. Rev. 1, 2-5 (1978).

rule of separation that the Framers had in mind when they drafted the First Amendment was adopted in a climate of accommodation and benevolence, not of hostility toward religion.

Of course, this is not to suggest that there was no concern that the State not sponsor, compel or actively participate in religious activity. This too was of concern, especially in states where there was no established State Church. In the words of James Madison, the First Amendment Religion Clauses were prompted because "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." Corwin, *The Supreme Court As National School Board*, 14 Law and Contemp. Prob. 3, 11 (1949). The fear of the Framers was that the State would promulgate a statist ideology and force it upon its citizens. To say this, however, is not to say that the Framers would have been apprehensive concerning the desire of a group of university students to meet and exchange their religious views. The Framers never envisioned, as will be seen in this brief, the situation in the present case where the Constitution would ever be used to deny the very freedoms they sought to establish.

B. The View Of Thomas Jefferson And James Madison.

In its early decisions interpreting the Establishment Clause, this Court turned for guidance to the experience of the Virginia Framers. As Justice Black stated in *Everson* v. *Board of Education*, 330 U.S. 1 (1947):

> . . . Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the

> movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

330 U.S. at 11. Justice Black relied heavily on James Madison's *Memorial and Remonstrance against Religious Assessments* and Thomas Jefferson's *Bill for Establishing Religious Freedom* as the basis for engrafting Jefferson's post-First Amendment "wall of separation" into Establishment Clause doctrine. Subsequent scholarship and this Court's more recent opinions, as will be seen below, have put that metaphor into a more balanced and accurate historical context.

It is doubtful that Madison intended the Establishment Clause to effect as complete a separation of church and state as the Court's opinion in the *Everson* case attributes to him. Madison's initial text for the First Amendment in the House of Representatives was worded " 'nor shall any national religion be established', and the first provision adopted in the Senate prohibited any 'law establishing articles of faith or a mode of worship. . . .' " Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 Harv. J. Law & Pub. Pol'y 125, 127-28 (1979). Madison's second version, reported from committee in the House of Representatives, read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." Fahy *supra*, at 79. Madison's understanding, according to the contemporaneous congressional journal, was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of

Congress 730-731 (1789-1791) *cited in* Corwin *supra*, at 11. In view of this record of Madison's participation in the drafting process, his 1785 statements contained in the *Memorial and Remonstrance*, though eloquent and even persuasive in context of a local political fight against levying a tax in support of religious instruction, do not fashion the Establishment Clause into the imposing barrier that a doctrinaire reading of Jefferson's metaphor would suggest.[3] A surprising number of scholars agree that Madison's views of separation of church and state expressed at the framing of the First Amendment were not as absolute as those portrayed in the early Religion Clause cases of this Court. *See* Corwin *supra*, at 10-16; Fahy *supra*, at 78-80; Meiklejohn, *Educational Cooperation Between Church and State*, 14 Law & Contempt. Prob. 61, 71 (1949); Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Washburn L. J. 65 (1962); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 Yale L. J. 692, 708-709 (1968); Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1057-1058 n. 11 (1978).

Jefferson was in Paris at the time the First Amendment was introduced and adopted. See Corwin *supra*, at 13. Although his ideas and writing may have influenced the climate for its adoption, there is, unlike for Madison, no direct evidence contemporaneous with the Congress that Jefferson's

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[3] Professor Sutherland has pointed out the dangers of making a metaphor into a rule of law:

> The wall of separation is a very satisfying metaphor. It has a fine, tangible sound. No one can doubt what a stone wall is. [and then citing Holmes in footnote 15] "The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. . . . Delusive exactness is a source of fallacy throughout the law." *Truax* v. *Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J. dissenting).
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> Sutherland *supra*, at 1311.

views did in fact directly influence the debate or drafting of the text of the Religion Clauses. See, e.g., Konvitz, *Separation of Church and State: The First Freedom,* 14 Law & Contemp. Prob. 44, 57 (1949) (whose evidence attributing influence to Jefferson is from years prior to or after the Convention).

Rather than a high and impenetrable barrier, what emerges from study of the relevant utterances of Madison and Jefferson is opposition to active involvement of the State in sponsoring or compelling religious worship and practices or the direct imposition of financial levies in support thereof. Although Jefferson's metaphoric "wall of separation" may not have been "as 'winding as the famous serpentine wall he designed for the University of Virginia'",[4] it was in Jefferson's time, as much as now, a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman,* 403 U. S. 602, 614 (1971). That the wall of separation was indistinct and variable for Jefferson and Madison is clearly seen in their reaction to issues and facts similar to those presented in this case several years after the adoption of the Religion Clauses.

Jefferson was the founder of the University of Virginia. From its inception, in 1819, the school has been wholly governed, managed and controlled by the State of Virginia. The question of the constitutional limitations with respect to the teaching of religion at the University of Virginia, in particular Christianity, was presented to him. In his annual report as Rector to the President and Directors of the Literary Fund of the University of Virginia dated October 7, 1822, approved by the Visitors of the University of whom

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[4] *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 761 (1973).

James Madison was one, Mr. Jefferson set forth his views in detail as follows:

> It was not . . . to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents therefore, a chasm in general institution of the useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, *to establish their religious schools on the confines of the University,* so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. *Such establishments would offer the further and great advantage of enabling the students of the University to attend religious exercise with the professor of their particular sect, either in rooms of the building still to be erected, and destined to that purpose under impartial regulations,* as proposed in the same report of the commissioners, *or in the lecturing room of such professor.* . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and

> would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion. . . ."

19 *The Writings of Thomas Jefferson* (Memorial ed., 1904) 414-17 (Emphasis supplied).[5] Simply put, Thomas Jefferson, in order to perpetuate and accomodate the religious beliefs and exercise of the students of the University of Virginia, recommended that students be allowed to meet on the campus to pray and worship together or, if need be, to meet and pray with their professors on campus. Jefferson was not opposed to religious worship and study being conducted on the premises of the University of Virginia. To the contrary, he accepted it as being within constitutional parameters. Moreover, it is clear that the so-called "wall of separation between Church and State" that Mr. Jefferson built at the University of Virginia, which he founded, did not exclude religious education from that school. As Justice Reed once said:

> The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

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[5] Jefferson's suggestions were adopted by the University of Virginia. The University's regulations drafted pursuant to Jefferson's views provided:

Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within,* or adjacent to, *the precincts of the University,* schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour. (Emphasis supplied) *Regulations of the University* (Oct. 4, 1824) Ch. II, Section 1.

Illinois Ex. Rel. McCollum v. *Board of Education*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

James Madison, who with Samuel Livermore was the principal drafter of the First Amendment, was a Member of the Board of Visitors which approved the report Jefferson made as Rector, providing a vivid indication of Madison's views on the constitutionality of voluntary religious worship and education in public schools. Moreover, it is interesting to note that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. J. O. Wilson, *Public Schools of Washington*, 1 Records of the Columbia Historical Society 4 (1897). In fact, he "was the chief author of the first plan of public education adopted for the City of Washington." *Id. at 5*. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the public school student. *Id.* at 9. If this Court is to maintain at least some semblance of allegiance to history and the intentions of the Framers, the freedom to associate voluntarily on the campus for religious purposes, as respondents seek to do, should not for the first time in our history be denied. To rule otherwise would not only distort the law but would run contrary to the wishes of the very men who drafted the document upon which we base our freedom.

II.

The District Court Erred In Holding That The State Regulation Was Needed To Avoid An Establishment Of Religion

The District Court found the State's prohibition of campus religious meetings to be constitutionally required to avoid an establishment of religion at the University. The

Court of Appeals reversed, holding that a "neutral" policy permitting students to use University facilities for self-directed activities did not constitute an establishment of religion. *Amicus curiae* submit that the reasoning of the Court of Appeals is constitutionally sound.

The District Court based its decision on the second strand of the tri-partite test fashioned in *Lemon* v. *Kurtzman*, 403 U.S. at 612-613. It held the principal or primary effect of permitting groups to meet for religious purposes, would be to advance religion, relying on *Tilton* v. *Richardson*, 403 U.S. 672 (1971), a case involving federal subsidies for the construction of facilities on sectarian campuses. The District Court's reasoning is defective for several reasons.

First, the *Tilton* case is inapposite. In *Tilton*, the Federal subsidy would have provided substantial state funding of facilities which could eventually be used solely and exclusively for religious purposes. The funding, in effect, constituted a substantial direct federal subsidy of religious institutions and activity. That is not the case here. There is no direct financial aid of any significance. Any financial benefit that does accrue from use of the University facilities is, as the Court of Appeals noted, minimal, especially since these students have paid an activities fee for the use of such facilities. This financial benefit is incidental, no more than that necessary for reasonable accomodation of religious expression. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 747 (1976).

Second, and more importantly, *Tilton* involved no countervailing Free Exercise or Free Speech interest. As Justice Brennan noted in *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203, 247 (1963) (Concuring Opinion), "the logical interrelationship between the Establishment and the Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be with-

held in order to avoid infringement of rights of free exercise."

The law of the case at bar should have been drawn from the cases involving religious practices and exercise in the context of public education. *Illinois ex. rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), *Zorach* v. *Clauson*, 343 U.S. 306 (1952), *Engel* v. *Vitale*, 370 U.S. 421 (1962), *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203 (1963), and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).[6]

McCollum, *Engel*, *Schempp* and *Epperson* involved state required religious activities as part of the school curriculum. *Zorach* involved an accommodation by the public school in favoring the religious interests of the students, i.e. permitting them to receive religious instruction on a "released time" basis. This distinction between the cases is important for the case at bar.

In *McCollum*, *Engel* and *Schempp*, it appeared to the school children and faculty that the State stood behind the content of the doctrinal teaching or exercise. In each, the government was actively sponsoring religion and mandating that religious exercises be conducted on its premises. In each, the religious exercise or practice was an integral part of the school curriculum. In *Epperson*, the State imposed its will on the curriculum indirectly by criminal sanction.

By contrast, in *Zorach*, the activities were *not* curricular

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[6] In *McCollum*, the Court forbade religious instruction in public school facilities on a "released time" basis. In *Zorach*, the Court permitted "released time" instruction off campus. In *Engel*, the Court outlawed a nondenominational prayer for public schools written by the Regents of the State of New York. In *Schempp*, the Court forbade state required Bible readings in public schools. And in *Epperson*, the Court invalidated the Arkansas anti-evolution statute.

in nature. They were *not* mandated or required by the State, but were rather voluntary. The State did not lend its backing or sponsorship to the activities. As Justice Douglas stated, each student was "left to his own desires as to the manner or time of his religious devotions, if any." 343 U.S. at 311. The force of the school system was not used to promote the religious instruction involved.

Admittedly, *Zorach* permitted off-campus religious activities, whereas *McCollum* forbade similar activities on-campus, but to entertain the notion that the geography of the activity is the only operative distinction is simplistic to the extreme and not supported by the case law. Justice Brennan plainly exposed the fallacy of this argument in his concurring opinion in *Schempp*. There, he explained that the real issue in *McCollum* was putting the religious instructor in the same position of authority as the secular teachers in the public school classroom, "lending to the support of sectarian instruction all the authority of the governmentally operated public school system." 374 U.S. at 263. He continued:

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

374 U.S. at 263. Writing in *Zorach*, Justice Douglas distinguished *McCollum* on these very grounds: "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction." 343 U.S. at 315. Four Justices concurring in *McCollum* also affirmed the basis of that decision: "[t]he momentum of

the whole school atmosphere and school planning is presumably put behind religious instruction . . . precisely in order to secure for the religious instruction such momentum and planning." 333 U.S. at 230-231.

Thus, if the "prestige and capacity for influence," the "momentum of the whole school atmosphere," and "the force of the public school," are placed behind a religious exercise or practice, there is an establishment of religion by the sovereign. The mere use of school facilities and the geographic location of any particular religious exercise or practice may or may not be relevant among other factors in reaching a determination that the state has imposed or sponsored such a practice or exercise.

Viewed in the *McCollum* line of cases, an "open forum" policy would not violate the Establishment Clause. There is no state sponsorship. No religious exercise is even remotely sanctioned by the University. No student is required to attend or participate in the religious meetings. No student is required to practice a religious exercise. No student or taxpayer is forced to contribute any more for religion in the operation of the University than for any other campus activity, societal endeavor or similar accomodation of religion. The student meetings for worship and teaching are wholly voluntary and without violation of conscience in any respect.

Moreover, an "open forum" policy is unquestionably neutral. There is no favoritism. There is no "religious gerrymander." The State is not lending its prestige, power or influence to religious thought or expression. There is absolute neutrality between religion and religion, and religion and non-religion. Each group is permitted to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach* v. *Clauson,* 343 U.S. at 313. This is the proper balance between establishment and free exercise.

Finally, the purpose or primary effect of permitting student religious meetings at the University is *not* the advancement of religion. Rather, the purpose or primary effect of an open forum is the development of the social and cultural awareness, as well as the intellectual curiosity, of students attending the University, allowing for the presentation and debate of ideas from every sphere of thought. This purpose, in the context of the religious element of our culture, has been eloquently stated by Alexander Meiklejohn, the former President of Amherst College:

> [T]he values to be gained by religious teaching are not merely private. To say that is to rob religious attitudes of all objective "spiritual" meaning. It is to reduce their significance to that of private personal idiosyncrasies. As against such false sectarianism, surely the value of all our creeds, religious or non-religious, lies in their common, though varied, attempt so to interpret men and society and the world as to find, in those interpretations, bases for human behavior, for human association.

Meiklejohn *supra,* at 66-67. Clearly, religious thought, culture and association are values properly questioned and explored in any educational setting. To attempt to segregate such expression from the intercourse of ideas by a false, wooden concept derived from a figure of speech extended to the limits of its logic is intellectual death of the highest form.[7]

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[7] Professor Harold J. Berman, Story Professor of Law at Harvard Law School lays the modern American malaise at the foot of undue separation of religion from public life: "Western man is undergoing an integrity crisis—the kind of crisis that many individual men and women experience in their early fifties when they ask themselves with utmost seriousness, and often in panic, what their lives have stood for and where they are headed. . . . Our whole culture seems to be facing the possibility of a kind of nervous breakdown." H. Berman, *The Interaction of Law and Religion* 21 (1974). He con-

III.

The Court Of Appeals Was Correct In Holding That The State's Regulation Violates The Establishment Clause.

The Court of Appeals found that the State Regulation violated the Establishment Clause because it had the primary effect of inhibiting religion, by singling out and stigmatizing religious groups. It also found that the State prohibition hopelessly entangled officials of the State in determining and monitoring whether a proposed event involved religious worship or teaching. Although this case represents one of the few reported cases where the Establishment Clause has in this manner vindicated individual free exercise rights, the approach taken by the Court of Appeals is constitutionally sound and fully in accord with the philosophy of the Establishment Clause and this Court's prior opinions. The State's use of the Establishment Clause "as a sword to justify repression of religion or its adherents from any aspect of public life,"[8] is constitutionally impermissible and must be recognized for what it is, "a law respecting the establishment of religion" the primary effect of which is to inhibit and regulate the free expression of religious belief.

"[T]here are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause." *School District of Abingdon Township* v. *Schempp*, 374 U.S. at 309 (Dissenting Opinion of Stewart, J.). The two Clauses overlap. The Establishment Clause protects free exercise by preventing preferral of one religious sect over another, or nonreligion over religion, or vice versa. The Free Exercise Clause, by preserving the in-

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cludes that this breakdown is accentuated, if not caused, by the separation of the religious from the public and warns that if these "compartments" are not "opened up to each other, they will imprison and stifle us." *Id.* at 18.

[8] *McDaniel* v. *Paty* 435 U.S. 618, 641 (1978) (Concurring Opinion of Brennan, J.)

violability of conscience, protects individuals and groups against forced expression of other creeds and thought, and exalts the right of the believer (or non-believer) to believe and express beliefs without fear of reprisal by the State. It is thus not inconsistent with Constitutional doctrine for there to be, in some circumstances, dual protection under both Clauses, or tension between the Clauses or cross purposes within a Clause.

In this case, the Court should protect the respondents against the State of Missouri's attempt to inhibit religious expression. It is essential that this protection be afforded under the Establishment Clause to protect these students (and other religious groups in this country) from similar assaults by misguided officials who, having just enough knowledge to be dangerous, apply the pronouncements of this Court to the end of eradicating individual religious expression from public life, establishing Secularism or nonreligion under a regime of state control.[9] *See Dittman* v. *Western Washington University* No. C79-1189V (W.D. Wash., Feb. 27, 1980), appeal docketed No. 80-3120 (9th Cir., April 7, 1980); *Brandon* v. *Board of Education,* 645 F.2d 971 (2nd Cir. 1980), No. 80-1396, petition for certiorari filed February 17, 1981; *Florey* v. *Sioux Falls School District,* 619 F.2d 1311 (8th Cir. 1980), *cert. den.,* 49 U.S. L.W. 3351 (November 10, 1980), *Surinach* v. *Pesquera de Busqueto* 604 F.2d 73 (1st Cir. 1979); *Johnson* v. *Huntington Beach Union High School District,* 68 Cal. App.3d 1, 137 Cal. Rptr. 43 (Ct. App. 1977), *cert. den.,* 434 U.S. 877 (1977); *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975); and *Stacy* v. *Williams,* 306 F.Supp. 963 (N.D. Miss. 1969), *aff'd* 446 F.2d 1366 (5th Cir. 1971). "The

[9] Attempts to suppress religious expression from public life are becoming more common. *See* Horn, *Taking God to Court,* 25 Christianity Today 24 (January 2, 1981).

Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Concurring Opinion of Brennan, J.).

A. The Primary Purpose And Effect Of The Regulation Is To Inhibit Religion

In *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203, 222 (1963), this Court stated:

> [The Court] has consistently held that the [Establishment C]lause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: What are the purpose and primary effect of the enactment. If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say to withstand the structures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

The State Regulation is plainly in violation of the Establishment Clause. It serves no valid secular purpose. Its purported purpose of nonestablishment, while laudable, proves too much. The actual purpose or effect of the regulation is to inhibit religion.

The Regulation specifically singles out religious worship and teaching as prohibited practices. Individual religious expression is thereby labeled as suspect. Meetings of students wishing to express religious beliefs are prohibited. This disparagement has resulted in a lessened visibility of religious groups on campus. It has caused the respondents great inconvenience, with no comparable meeting facility on or near the campus. Their group, once the largest on

campus, has lost over a third of its membership. Perhaps most troubling is the stipulated testimony of one of the students, Florian Frederick Chess, that the State's action has caused "our message and our purposes [to] seem more remote and less relevant to the typical student." *Chess* v. *Widmar*, 480 F.Supp. 907, 912 (W.D. Mo. 1979). In short, the State has suppressed religious expression at the University of Missouri at Kansas. This is shameful and a travesty on the liberties guaranteed by the United States Constitution. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel* v. *Paty*, 434 U.S. at 641 (Concurring Opinion of Brennan, J.).

"State power is no more to be used so as to handicap religions that it is to favor them." *Everson* v. *Board of Education*, 330 U.S. at 18. There is no "constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach* v. *Clauson*, 343 U.S. at 314. "We cannot read into the Bill of Rights such a philosophy of hostility to religion." *Id.* at 315.

Moreover, the exclusion of religion from the forum of ideas at the University of Missouri favors nonreligious thought and expression. Secularism is given a monopoly to flourish, religion is cut off and disparaged. In *Schempp*, 374 U.S. at 225, this Court stated:

> We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who

> do believe." *quoting Zorach* v. *Clauson*, 343 U.S. at 314.

The State's action here, however, amounts to a *de facto* establishment of Secularism. *See Gianella, Religious Liberty, Nonestablishment and Doctrinal Development*, 81 Harv. L. Rev. 513, 586-587 (1968); Bird *supra*, at 174-185 (and cases cited therein); and *Torasco* v. *Watkins*, 367 U.S. 488, 495 n. 11 (1961). As one recent observer has said, it is a

> legal fiction that schooling can be value-neutral. By its use of the secular-religious dichotomy the Court has been able to eliminate an obvious form of belief manipulation — religious observance — from public schools, but it has thereby implied that the secular content of schooling does not touch upon the basic beliefs and values of students. . . .

Arons, *The Separation of School and State: Pierce Reconsidered*, 46 Harv. Educ. Rev. 76, 97 (1976) *cited* in Bird *supra*, at 180.

Alfred North Whitehead has pointed out that all education is essentially religious. A. N. Whitehead, *The Aims of Education* 26 (1952). Education as contrasted with vocational training requires an examination and discussion of fundamental values and the determination of who one is. The University of Missouri has recognized the need for these discussions by encouraging student "self-directed activit[ies]" on campus to provide opportunities for "self-realization and individual growth." *Chess* v. *Widmar*, No. 80-1048 p. 2, n. 1 (8th Cir. August 4, 1980). Such inquiry is essentially religious in nature. The effect of the University's Regulation is to limit this inquiry to the humanist schools of experience, banning inquiry into those schools of human learning and experience which look for such answers in a supernatural framework. This policy places

the force of the State behind a particular line of thought and expression, and directly against the classic Judeo-Christian religious tradition and other schools of religious thought which interpret man's behavior and condition from a divine perspective. The establishment of non-religion at the University of Missouri should not be permitted to stand.

B. The Regulation Will Cause Excessive Entaglement With The State In Regulating And Monitoring Religious Expression

In addition to inhibiting religious expression, the State's action carries with it the danger of excessive entanglement. See *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501-504 (1979). The respondents here were required to submit information as to their activities and meetings. Abuses in this area could develop. See *Surinach* v. *Pesquera de Busqueto*, 604 F.2d 73 (1st Cir. 1979).

Although the respondents had clearly religious purposes that may not always be the case. Can State officials judge what is "religious" worship and teaching and what is not? *See, e.g., Malnak* v. *Yogi*, 440 F. Supp. 1284 (D. N.J. 1977) *aff'd curiam* 592 F.2d 197 (3rd Cir. 1979), a case involving a successful challenge to a public school elective course in the "Science of Creative Intelligence—Transcendental Meditation." Or will the University monitor the Jewish College Students or the Karate Club (see footnote 1 of the Court of Appeals opinion) to insure there is no religious content to their meetings? The record in the case at bar contains evidence that the Chief of Building and Grounds told one of the students that "the only way that we could be permitted to meet was if we presented all possible views of the Bible fairly, and not talk about just one view of

the Bible." 480 F. Supp. at 913. How was this exception carved out of the policy?

This Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), refused to permit state inspection and evaluation of parochial school expenditures. "Are state officials more competent to judge the religious nature of activities than they are to judge the religious nature of expenditures?" Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 Pepperdine L. Rev. 313, 350 (1980). The State Regulation will generate a regime of official regulation of religion, administrative measures subject to legal clarification and adjudication by public officials. State officials should not be making such judgments concerning religion. It will lead inexorably to excessive entanglement.

CONCLUSION

If the petitioners had chosen to accommodate the religious interests of their students who, in a very real sense, make their homes on the campus, petitioners would have done nothing more than was done at the University of Virginia 200 years ago at the suggestion of Thomas Jefferson and James Madison. If the petitioners had chosen to accommodate the respondents' interests, they would not have done so with a religious purpose but only for the purpose of ensuring the students' constitutional rights, of developing their social, intellectual and cultural awareness, or of accommodating those who desire to express themselves religiously.

For decades American educators and students have labored under the dark shadow of the layman's belief that the United States Supreme Court has ruled that nothing of a religious nature can take place on the campus of a publicly supported educational institution even if there is no connection between the activity and the school. And this,

despite the fact that Justice Clark, the author of the opinion in *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203 (1963), attempted on various occasions to make clear that "the Court has specifically held only one thing with specific reference to prayer in the public schools and that is that required prayer in the public school violates the Establishment Clause."[10] Moreover, Justice Clark stated:

> Most commentators suggested that the court had outlawed religious observances in public schools when, in fact, the court did nothing of the kind. Comment, *Constitutional Law—Religious Exercises and the Public Schools*, 20 Ark. L. Rev. 320, 325-26, n. 44 (1967).

In drafting their constitution, the people of the State of Missouri, echoing the beliefs of the Framers, proclaimed in their preamble: "We, the people of Missouri, with profound reverence for the Supreme Ruler of the Universe and grateful for His goodness, do establish this Constitution for the better government of the State". Never in their wildest imaginations did the drafters of this instrument conceive that one day their constitution could be argued in such a manner as to prohibit a group of students such as respondents from meeting on a university campus in that state.

Amicus curiae fervently argues that many fundamental constitutional rights are being violated under the misapplication of the Establishment Clause. Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 Emory L. J. 3, 27 et seq. (1978). The District Court, however, failed to take into account the value of the constitutional rights of these students for no

[10] Published official transcript of Justice Clark's address as the featured speaker of a symposium on "*Religion and the Public School*" at Wartburg College, Waverly, Iowa (Nov. 5, 1964) 46.

higher a reward than that an empty university room (not "classroom") be kept empty. As the United States Supreme Court has so eloquently stated:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).

The decision of the District Court conflicts with the intentions of the Framers of the First Amendment as well as recent decisions rendered by the United States Supreme Court and lower federal courts. It is essential that the conflict be resolved promptly and in favor of the respondents, lest by unconstitutional restraint fundamental rights be strangled and, therefore, denied the respondents.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, et al.,
Petitioners,

v.

CLARK VINCENT, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")

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No. 80-689

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

GARY E. WIDMAR, et al.,

Petitioners,

v.

CLARK VINCENT, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the National Jewish Commission on Law and Public Affairs ("COLPA"), respectfully move this Court for leave to file the accompanying brief *amicus curiae* in support of the position of respondents that the decision below should be affirmed.

Consent to file this brief has been sought from the parties. Counsel for respondents consented to the filing of this brief, but counsel for petitioners have refused to consent on the ground that it is their general policy not to consent to the filing of *amicus* briefs, whether they be

favorable to or contrary to their position. It is therefore necessary to request leave of Court to file the attached brief, pursuant to Rule 42.

COLPA is a voluntary, not-for-profit corporation of attorneys and social scientists of the Jewish faith, dedicated to combatting all forms of religious prejudice and discrimination and representing the position of the Orthodox Jewish community in matters of public affairs. Since its organization in 1966, COLPA has filed *amicus* briefs before this Court in numerous cases involving the Free Exercise and Establishment Clauses of the First Amendment. *See, e.g., Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977); *Parker Seal Co. v. Cummins,* 429 U.S. 65 (1976); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

This case is of substantial importance to the Orthodox Jewish Community because it presents the question of whether a state agency may impede the free exercise of religion guaranteed by the United States Constitution by singling out assembly for religious purposes and according it *less* protection than that accorded to assembly for other purposes. In our view, the special protection given to religion by the Free Exercise Clause mandates that religious speech and assembly be accorded at least the same rights that are granted to other types of speech and assembly.

COLPA believes that the accompanying brief will be of assistance to the Court because it will give this Court the benefit of COLPA's views based on its extensive experience in the area of the First Amendment.

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs ("COLPA") is a national organization of attorneys and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. COLPA is fully committed to the preservation of constitutional and statutory rights for all

citizens in order that citizens of minority religious faiths, in common with all other citizens, may enjoy the blessings of liberty.

This brief is also joined by the Agudath Israel of America, National Council of Young Israel, Rabbinical Council of America, and Union of Orthodox Jewish Congregations of America.

Agudath Israel of America is a national organization with congregational and individual members with branches in major Jewish population centers throughout the country. The National Council of Young Israel is a coordinating body for more than 185 affiliated Orthodox Jewish synagogues throughout the United States. The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world with a membership of more than 1000. The Union of Orthodox Jewish Congregations of America is a central spokesman for approximately 1000 Orthodox Jewish congregations in the United States. All of these organizations have a vital concern for the protection of religious liberty.

This case is of substantial importance to the Orthodox Jewish Community because it presents, in stark form, the question of whether voluntary religious activity by a group of adults may be subjected to unique and serious disabilities by a State agency on account of the "neutrality" obligation of the Establishment Clause. Does the Constitution permit a governmental agency to single out religious assembly and accord it *less* privileges and protections than are accorded to similar assembly which is totally secular?

In our view, religion occupies a specially protected place in American society. Those who engage in religious speech and assembly should be entitled to *at least* the rights and safeguards granted to other forms of speech and assembly. To Orthodox Jews, this principle is no theoretical matter. Jewish tradition commands prayer

three times each day and obligates every person to set aside time for daily study of religious law. Observant Jews whose occupations require them to be in and about public buildings must frequently make use of public facilities for brief prayer or study services, which often require the attendance of a *minyan*—a quorum of ten men. The great traditions of this Nation—which afford the widest latitude and safeguard for worship and other peaceful manifestations of religious belief—surely permit public facilities which are customarily available for adult meetings to be used to accommodate such religious duty. The Establishment Clause of the First Amendment is not, we believe, a charter for the suppression of religion. When taken together with the Free Exercise Clause, it puts religious assembly on no less a footing than that occupied by secular assembly.

ARGUMENT

INTRODUCTION

The University of Missouri has determined that in the age-old tradition of academic freedom, it will make the University's facilities available to recognized student groups for meetings, discussions, and other similar events and programs involving the communication of ideas. Although religious student groups are among the more-than-ninety recognized organizations, the University has barred the use of its facilities for "religious worship" and "religious teaching." The question presented by this case is whether "religious worship" and "religious teaching" may be singled out in this manner—*i.e.*, whether adults wishing to engage peacefully in this form of communication may be denied the rights accorded to adults wishing to engage in assembly and communication relating to non-religious subjects.

Two established constitutional principles collide with the University's policy of selectively excluding religious meetings from the access of University facilities granted to all other forms of meetings: *First,* the firmly fixed rule, recently re-emphasized by this Court in *Carey v. Brown,* 447 U.S. 455, 463 n.7 (1980), that "the First and Fourteenth Amendments forbid discrimination in the regulation of expression on the basis of the content of that expression." *Second,* the command of the First Amendment that no governmental agency may interfere with the free exercise of religion, a constitutional directive which, as this Court very recently noted, "by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board,* 101 S.Ct. 1425, 1430 (1981).

The University's sole justification for treating "religious worship" and "religious teaching" differently from secular assembly or secular instruction is that the Establishment Clause of the First Amendment requires or permits it to do so. This assertion is plainly wrong. The Establishment Clause was not designed to burden or disable adults engaged in individual religious worship or teaching. The Establishment Clause prevents government from preferring religion over non-religion and from placing its power and prestige behind one religious faith in preference to another. But if the position of the University in this case is sustained, the Establishment Clause becomes a means of denigrating religion—of reducing its legal status and entitlement below that of any and all other forms of communication. The University's policy would permit use of its buildings for purposes which are totally frivolous and serve no end other than mere entertainment, while denying use of such facilities to totally voluntary assembly and instruction for purposes which have uplifted the human species from the beginnings of recorded history.

I

A PUBLIC AREA MADE AVAILABLE FOR SECULAR MEETINGS MAY NOT BE DENIED FOR VOLUNTARY ADULT RELIGIOUS MEETINGS

This Court has long recognized that conduct protected by the Free Speech Clause of the First Amendment is not removed from that protection because the speech is religious in nature. In *Martin v. City of Struthers,* 319 U.S. 141 (1943), for example, the right to distribute literature door-to-door was upheld under "the federal Constitution's guarantee of free speech and press" when asserted by an individual "espousing a religious cause in which she was interested." 319 U.S. at 141-42. The same principle was applied in *Cantwell v. Connecticut,* 310 U.S. 296 (1940), to the solicitation of funds for religious purposes, 310 U.S. at 303-07, and to the communication of a religious message. *Id.* at 307-11. In reaching these results in *Cantwell,* this Court noted that a State could not, by statute, "wholly deny the right to preach or disseminate religious views," *id.* at 304, and grounded its decision both on the constitutional requirement "that the free exercise of religion be not prohibited" and on the imperative "that freedom to communicate information and opinion be not abridged." *Id.* at 307.

Similarly, it is a well-established constitutional principle that once particular property is made available for public use, the government may not distinguish, on the basis of content, among uses which are otherwise similar in time, place and manner. *See, e.g., Carey v. Brown,* 447 U.S. 455 (1980); *Police Department v. Mosley,* 408 U.S. 92 (1972). As this Court has explained:

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley, supra,* at 95.

See also *First National Bank v. Bellotti,* 435 U.S. 765, 785-86 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."); *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission,* 429 U.S. 167, 175-76 (1976); *Hudgens v. National Labor Relations Board,* 424 U.S. 507, 520 (1976); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209, 215 (1975); *Healy v. James,* 408 U.S. 169 (1972).

The kinds of student meetings which the University of Missouri routinely allows on its premises are similar in time, place and manner to the meetings which have been prohibited to the respondents. The only difference is that the University's challenged regulations prohibit meetings if their *content* is "religious worship" or "religious teaching." The distinction between "secular teaching" and "religious teaching" is as impermissible as a distinction between "conservative teaching" and "liberal teaching" or between "Republican teaching" and "Democratic teaching." The State may not close the doors of its public facilities selectively to "religious teaching" any more than it could to "liberal teaching" or "Republican teaching."

II

RELIGIOUS TEACHING AND RELIGIOUS WORSHIP ARE ENTITLED TO SPECIAL PROTECTION UNDER THE FREE EXERCISE CLAUSE

In a series of cases decided almost forty years ago in which this Court dealt with the subject of religious expression, the Court gave religion a status *higher* than that of ordinary speech. In *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), the Court overruled a decision rendered in the previous Term (*Jones v. Opelika,* 316 U.S. 584 (1942)) and held that religious evangelists could not constitutionally be subjected to the same license tax that applied to commercial distributors of books or other publications. Noting the "preferred position" given to freedom of religion by the First Amendment (319 U.S. at 115), this Court said:

> "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." *Id.* at 111.

More recently, in *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972), this Court reiterated the preferred position of the Free Exercise Clause by stating that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." And in *Sherbert v. Verner,* 374 U.S. 398 (1963), the Court recognized that even "indirect 'discouragements' " can place an impermissible "burden on the free exercise of . . . religion." 374 U.S. at 403-04 & n. 5.

The special protection which the Free Exercise Clause of the First Amendment grants to religious expression and religious worship is surely offended by a rule which per-

mits a public facility to be used as a meeting-place by adults for any purpose *except* religious worship or religious instruction. Rather than giving religious belief and practice a "preferred position," such a rule gives religion an ignominiously low status. This Court's decision in the area of Free Exercise do not permit such a result.

III

THE ESTABLISHMENT CLAUSE NEITHER REQUIRES NOR JUSTIFIES THE UNIVERSITY'S SELECTIVE POLICY REGARDING RELIGIOUS MEETINGS

The University justifies its position by claiming that the Establishment Clause of the First Amendment would be violated if student meetings for religious worship or teaching were treated no differently from meetings held for any secular purpose. This claim rests on a misunderstanding of the principles underlying the Establishment Clause.

A. Granting Religious Meetings the Same Access to Public Facilities As Secular Meetings Does Not Constitute "Advancement" or Prohibited "Financial Assistance."

A fundamental misapprehension which pervades petitioners' position is the failure to understand that the only right which is being sought here on behalf of religious meetings is the right of *equality*—the right to be treated no worse and no differently merely because a meeting is religious rather than secular in nature. It is, of course, true that a student group that is treated with the dignity given all student groups by University officials is more likely to attract participants than a group which is given second-

class treatment. The University argues that it would be "advancing" religion if it permitted the respondents to conduct their meetings on campus because students would then "feel comfortable" coming to the meeting and would not think there is "something wrong" with the group (Pet. Br. 17-19).

If carried to its logical extreme, this argument means that any government agency which does not prohibit religious worship is "advancing" religion. Obviously, if religious worship is as lawful as any other activity, participants will "feel comfortable" during such worship and will not think there is "something wrong" with the religious service. It is ludicrous, however, to suggest that the Establishment Clause requires that religion be prohibited because the absence of a prohibition will "advance" or "encourage" religion more than if it is forbidden. Indeed, as this Court made clear in *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970), "rigidity [in the application of the Religion Clauses of the First Amendment] could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." Rather, what is required is "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* That is all that respondents here ask.

The same analysis demonstrates the fallacy of the "financial assistance" argument made by the petitioners (Pet. Br. 19-22). Of course, public expenditures are involved in maintaining public buildings. In a strictly logical sense, some of those expenditures are attributable to religion if religious meetings are held, along with all other meetings, in such public buildings.

By the same token, public moneys are being spent for religious purposes when a church is within a fire station's zone of coverage, or within a particular police precinct, or

within a sewage district. Yet the Establishment Clause is not violated if the church receives only an *equal* share of the services made available to the general public.

This was the precise holding of this Court in *Walz v. Tax Commission, supra.* There, the Court upheld the constitutional validity of tax exemptions granted to religious organizations. Quoting from the landmark decision in *Everson v. Board of Education,* 330 U.S. 1 (1947), where the Court ruled that a state may pay for the transportation of children to parochial schools, Chief Justice Burger reasoned:

> "Surely, bus transportation and police protection to pupils who receive religious instruction 'aid' that particular religion ... . [I]f . . . buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the religion clauses." 397 U.S. at 671.

Rather, the Court concluded, the provision of such services did not violate the Establishment Clause because they "are no more than incidental benefits accorded all persons or institutions within a State's boundaries." *Id.* at 676. Here, too, if religious groups are permitted to use the University's facilities on terms equal to, and no better than, those offered to the public at large, there is no impermissible aid to religion.* The issue is, as this Court

* The language in *Tilton v. Richardson,* 403 U.S. 672, 679-80 (1971), which refers to use of college facilities "for religious instruction, training, or worship" relates to the total dedication of a facility, or a portion thereof, for religious purposes. If a University were to set aside one wing of a building for a chapel or for a religious-instruction classroom, the language of *Tilton* would come into play. The present case involves the use of ordinary facilities—available for many other purposes—for occasional religious meetings.

observed in *Tilton v. Richardson,* 403 U.S. 672, 679 (1971), "not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

The Establishment Clause was not designed to destroy religion in this country or to place it or its adherents at a permanent disadvantage. It was added to the Constitution, as this Court has noted, "to stand as a guarantee that neither the power nor the prestige of the . . . Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office." *Engel v. Vitale,* 370 U.S. 421, 429-30 (1962). The situation presented by this case is a far cry from that which gave rise to the fears expressed and forestalled by the Founding Fathers.

B. Rules Applicable to Elementary and Secondary Schools Do Not Apply to Colleges.

A second factor which distinguishes this case from many of those cited by the petitioners is the age of the individuals involved. This is not a case involving religious worship or a religious ceremony in a primary or secondary public school. Because children of primary and secondary-school age are particularly impressionable and it is difficult to distinguish between coerced and voluntary participation in pre-college activities, this Court has been particularly sensitive to Establishment Clause cases involving primary and secondary schools. *See, e.g., Lemon v. Kurtzman,* 403 U.S. 602 (1971). But, as the Court noted in *Tilton v. Richardson,* 403 U.S. 672, 686 (1971):

> "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view ... . "

This case, therefore, does not present any serious question as to the "voluntary" character of the worship or instruction undertaken by the respondents. *Compare Brandon v. Board of Education,* 635 F.2d 971 (2d Cir. 1980), *petition for cert. filed,* 49 U.S.L.W. 3645 (U.S. Feb. 17, 1981) (No. 80-1396). Nor does it involve a governmental agency propagating to youngsters of impressionable age doctrines of religious faith. *Compare Stone v. Graham,* 101 S. Ct. 192 (1980). The question here is whether college-age students, who voluntarily wish to meet occasionally for religious worship in a public facility which is available for secular meetings, shall be forbidden from doing so because of a restriction allegedly based on the Establishment Clause. No decision interpreting that Clause and no constitutional principle derived from it justifies such a result.

C. Missouri's Constitutional Principle of Separation Does Not Justify Discrimination Against Religion.

Petitioner's final argument is that, irrespective of the *federal* constitutional rule, the University is justified in impeding the free exercise of religion because of Missouri's strong policy of separating church and state (Pet. Br. 32-42). This argument is patently unsound.

It is plain, we submit, that a State cannot override a federal constitutional liberty by asserting that its own constitution or laws contain provisions which diminish the federal right. The Supremacy Clause of the Constitution, which declares in Article VI that the United States Constitution "shall be the supreme law of the land," precludes

any such result. Individual liberties guaranteed by the Free Exercise Clause cannot be different in each State of the Union depending on how heavily each State wishes to emphasize its own concept of "separation." Religious conduct or expression protected by the Free Exercise Clause in New York or in Kansas must also be protected by the Free Exercise Clause in Missouri. The Federal Constitution is not a patchwork quilt of multi-hued liberties.

One can readily conceive the injustice and uncertainty that would result from the adoption of the kind of rule urged by petitioners. Could the State of Illinois deny unemployment compensation benefits to an individual in the position of the petitioner in the recently decided case of *Thomas v. Review Board,* 101 S. Ct. 1425 (1981), if its constitution or laws contained a very strong policy requiring the State's inhabitants to find work rather than receive unemployment benefits? Could the State of Idaho force an Amish child to attend a regular school to the end of high school notwithstanding *Wisconsin v. Yoder,* 406 U.S. 205 (1972), if it claimed that a "compelling interest" is expressed in its constitution and laws to educate all its children to the end of the high school years? Such arguments would receive their deserved short shrift. Missouri's is entitled to no more.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Motion

Brief of the Regents of the University of California As Amicus Curiae

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Motion for Leave To File Amicus Curiae Brief

The Regents of the University of California respectfully moves this Court for leave to file a brief in this case as *amicus curiae.* The consent of the attorney for the respondents herein has been obtained, but the attorney for the petitioners herein refused to consent to the filing of a brief by The Regents of the University of California as *amicus curiae.*

The applicant, The Regents of the University of California, has an interest in this case in that the reversal by this Court of the decision of the United States Court of Appeals for the Eighth Circuit presumably would have a significant effect upon the manner in which the University of California, and other public universities with similar rules, regulate the use of their facilities with regard to student religious organizations.

By means of this *amicus curiae* brief The Regents of the University of California believes it can assist this Court by informing it of the nature of and the rationale for regulations on facilities use of a major public institution of higher education that do not discriminate against religious expression and activities.

Respectfully submitted,

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INTEREST OF AMICUS

The University of California ("UC") is a state supported university with nine campuses, approximately 130,000 students, and 65,000 full time employees. Under UC policy groups of students and employees may register with an appropriate campus office and reserve certain meeting rooms, auditoriums and other facilities for any lawful purpose when they are not being used for official University purposes and subject to other time, place, and manner regulations. There are now 1,975 such registered campus organizations pursuing a myriad of diverse interests and activities. Approximately 7 percent of these organizations can be characterized as "religious." In common with all other organizations they are free to reserve facilities on a space available basis for lawful purposes including religious activities.

Facilities are generally provided free of charge except when a particular use involves costs over and above routine maintenance. UC policy makes clear that reservation of a facility does not imply UC support, and organizations are prohibited from making any claims of UC support.

We are satisfied that the opinion of the Eighth Circuit Court of Appeals in this matter correctly analyzes the constitutional issues and do not propose to further brief those issues. Indeed, it was largely upon just such a legal analysis, coupled with reasons of policy, that UC developed its current regulations.[1]

This brief seeks to inform the Court of the nature of UC's regulations and their effect of enabling UC to steer a course that is in accord with both the Establishment Clause and the Free Exercise Clause of the First Amendment.

SUMMARY OF ARGUMENT

UC contends that a nondiscriminatory policy permitting all registered campus organizations, including religious organizations, to reserve facilities on a space available basis is at the very least constitutionally permissible, and probably constitutionally required. Such a neutral policy

---

1. See Kaplin, W., *The Law of Higher Education*, at 28-29 (1978):

> "It is clear that, under the establishment clause of the First Amendment, public institutions must maintain a neutral stance regarding religious beliefs and activities; they must, in other words, maintain religious neutrality. Public institutions may neither favor or support one religion over another nor favor or support religion over nonreligion . . .
>
> "Neutrality, however, does not necessarily require a public institution to prohibit all religious activity on campus. If a rigidly observed policy of neutrality would discriminate against campus organizations with religious purposes or impinge on an individual's right to 'free exercise' of religion, the institution may be permitted—sometimes required—to allow some religion on campus."

with regard to use of facilities by religious groups assures on the one hand that UC is not approving or disapproving of religious activity, and on the other that it is not unnecessarily burdening the free exercise of religion.

ARGUMENT

I. University Of California Policy.

UC policies with regard to use of facilities provide in pertinent part as follows:

> "All use of University properties and services by campus organizations must conform to applicable time, place, and manner regulations. Those using University properties and services must avoid any unauthorized implication that they are sponsored, endorsed, or favored by the University.
>
> "As a State instrumentality, the University must remain neutral on religious and political matters. The University cannot sponsor or fund religious activities, and cannot sponsor or fund political activities, except when authorized by The Regents or the President or their designees. Religious and political campus organizations shall have access to University properties on the same basis as all other campus organizations, according to guidelines set forth in campus regulations."

Each of the nine campuses of the University of California has developed policies implementing this regulation which make particular facilities available for the use of all registered organizations.

II. Rationale For University Policy.

UC has avoided a rule prohibiting the use of facilities for religious activities because it would require UC to engage in the difficult and burdensome task of determining whether a particular request is or is not for a religious activity. Standards would have to be developed to dis-

tinguish religious from nonreligious activities. All organizations would have to be monitored to assure that even secular organizations are not seeking to engage in religious activities. This would produce the very entanglement that the Establishment Clause is aimed at preventing. And it would do so in a setting where there is little real danger of establishment given the maturity and skepticism of university students. Also, many activities may be on the borderline between religious and nonreligious. If UC should make the wrong choice and classify a nonreligious activity as religious it would risk denying equal protection and First Amendment rights to the organization turned down.

In contrast to the detrimental effects of a policy prohibiting religious activities, UC's policy of neutrality is supportive of associational rights as well as the free exercise of religion and speech by campus organizations. Further, a neutral stance insulates UC from espousing the views of any group and does not advance or inhibit religion any more than access to facilities by political or other special interest organizations advances or inhibits a particular political or social cause.[2] See *Healy* v. *James*, 408 U.S. 169 (1972); *Gay Lib* v. *University of Missouri*, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978). Indeed, to single out religious activities would be to discriminatorily inhibit one special class of activities which could result in negative implications about the activities.

Thus, in developing its regulations UC has attempted to refrain from supporting religious activities in a manner that would be in violation of the Establishment Clause as well as avoid a rule that isolates and treats adversely re-

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2. For example, if UC opens up its facilities for the purpose of allowing films to be shown, it must permit a student organization to show *Triumph of Will*, the classic 1933 Nazi propaganda film. But it would not follow that UC is advancing the cause of Nazism.

ligious groups and activities in a manner that would be in violation of the Free Exercise Clause and would also risk violating other constitutional rights.

CONCLUSION

Universities ought to be able to permit the expression of religious ideas, just as they permit the open expression of political and other controversial ideas. Surely, where the only state involvement is the limited use of public facilities on a space available basis, the Constitution cannot be read to prohibit the open exchange of ideas in that forum which has traditionally been held to be the bastion of open expression. There should be no constitutional impediment to a University's maintaining a neutral stance with regard to the content of the expression that takes place in university facilities, subject only to time, place, and manner restrictions.

Although we have grave reservations as to the constitutionality of a regulation such as that of the University of Missouri prohibiting all use of university facilities for religious activities, our purpose is not to seek the invalidation of the University of Missouri policy. Rather, we urge the Court in deciding this case to avoid a disposition that would call into question policies such as those of the University of California which do not discriminate against religious expression or activities in matters of facilities use.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-689

GARY E. WIDMAR, *et al.*,
Petitioners,

v.

CLARK VINCENT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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GARY E. WIDMAR, *et al.*,

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CLARK VINCENT, *et al.*

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CATHOLIC CONFERENCE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The United States Catholic Conference respectfully moves this Court for leave to file a brief *amicus curiae* in support of respondents in this case. Petitioners, through their counsel, have indicated their refusal to consent to appearance of *amici* in this matter, thereby necessitating this motion. The consent of the attorneys for the respondents has been obtained.

The United States Catholic Conference is the civil agency of the Catholic Bishops of the United States. The programs of the USCC embrace the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, and communications and public affairs, with emphasis on the preservation of religious liberty in America.

This case raises the important question of whether a public university may exclude self-directed, extracurricular religious observance by student groups from the campus, either as a purported requirement of the

Establishment Clause or in pursuit of an alleged compelling state interest in strict separation of church and state.

This *amicus* believes that proper evaluation of the issues presented in this case requires consideration of the part which religious values play in shaping the character and social behavior of our people, and of the traditional and functional role which religion has played in public higher education. It is believed that the parties will not deal adequately with these aspects of the issues.

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SUMMARY OF ARGUMENT

The principle of benevolent neutrality serves more than the cause of individual religious liberty. On another level in which the law has a profound practical interest, benevolent neutrality promotes the welfare and common good of society by permitting spiritual values to act freeley, with other influences, as a leaven in the behavior of the citizenry. The public order and common good are served by "benevolent neutrality" every bit as much as is the individual in the enjoyment of his religious freedom.

Religion has long played a prominent part in the life of public universities. Neither the letter nor spirit of the First Amendment requires exclusion of self-directed religious activity by student groups from the campus. The systematic banishment of religious observance from the university campus, which is an otherwise self-contained community, must inevitably contribute to the decline of moral values in modern life and is totally out of keeping with the traditions and modes of the larger society. Moreover, it inhibits the free-exercise rights of the students. Such a policy amounts to one of hostility to religion.

It is doubted that anything contained in the constitution or laws of Missouri, as enunciated by its courts, requires the degree of separation advocated by petitioners. However, even assuming that Missouri's constitution can be so construed, such a state interest can hardly overbalance respondents' legitimate claims to the free exercise of their religion.

ARGUMENT

THE SUPPRESSION OF VOLUNTARY STUDENT RELIGIOUS ACTIVITY IN THIS CASE DISSERVES THE COMMON GOOD OF SOCIETY, RADICALLY DEPARTS FROM THE BEST UNIVERSITY TRADITIONS, AND FLAGRANTLY VIOLATES THE CONSTITUTION'S GUARANTEE OF RELIGIOUS FREEDOM.

In this case a state university has endorsed a lamentable policy of hostility to religion. Its decision is an untenable departure from the principle of "benevolent neutrality" which is the cornerstone of the edifice of church-state relations. *See Walz v. Tax Commission of New York*, 397 U. S. 664, 669 (1970); *Zorach v. Clauson*, 343 U. S. 306, 313-14 (1952).

"Benevolent Neutrality"—A Practical Social Doctrine

The doctrine of "benevolent neutrality" advances the common good of society by permitting spiritual values to act freely, with other influences, as a leaven in the behavior of the citizenry. Benevolent neutrality is an imperative principle founded in the practical wisdom that "piety, religion, and morality are intimately connected with the well being of the State, and indispensable to the administration of civil justice." 3 J. Story, *Commentaries on the Constitution of the United States* 722 (Boston 1833). Benevolent neutrality accords with the policy by which government fosters charitable and educational institutions generally "as conservators of the public morals, and valuable if not indispensable assistants to the preservation of the public order." T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the American Union* 471 (Boston 1868); *see also Bradfield v. Roberts*, 175 U.S. 291 (1899).

Clearly, benevolent neutrality works a just accommodation of religion as a matter of keen social self-interest. In service to this verity, this Court has prudently held:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Zorach v. Clauson, supra, at 313-14. If benevolent neutrality serves society, the hostility to religion which so often pervades the rhetoric of "separation" can only tend to undermine it!

Education And Contemporary Lawlessness—
The Chief Justice Speaks

The ramifications of the banishment of religious activity from the campus are pervasive. Jurists and educators alike have deplored the decline in moral and spiritual values in modern life and have attributed this in large part to the exclusion of moral and spiritual values from our public educational institutions. In his recent report concerning the problem of crime and lawlessness in our society, the Chief Justice observed: "Possibly some of our problem of behavior stems from the fact that we have virtually eliminated from public schools and higher education any effort to teach values of integrity, truth, personal accountability and respect for other's rights." *Annual Report to the American Bar Association by the Chief Justice of the United States,* 67 A.B.A.J. 291 (1981). *See also Johnson v. Huntington Beach U. High Sch. Dist.,* 68 Cal. App. 3d 1, 30-35, 107 Cal. Rptr. 43, 60-64 (Ct. of App. 1977) (McDaniel, J., dissenting); W. Overholt, *Religion in American Colleges and Universities* 11-12 (1970); Gallup, *Introduction to the 1979-80 Religion in America Index,* reprinted in 1 PRRC Emerging Trends, No. 6 (1979).

The Public University—Inculcation of Social Values

The college years can be a time of deep spiritual unrest and upheaval in which values are critically reexamined and life-determining commitments are made. *See* W. Overholt, *supra*, at 15-16; R. Taylor, *This Damned Campus* viii (1969); J. Hardon, *The Hungry Generation* 23 (1967). In institutions whose infrastructure is necessarily secularized, religion provides those spiritual and humane values which underlie truly liberal education. *See* H. Hintz, *Religion and Public Higher Education* 16-21 (1950); H. Allen, *Religion in the State University* 71, 79 (1950); C. Thwing, *Education and Religion* 104-15 (1929). By integrating the totality of knowledge in a way not done by other disciplines, and by providing a coherent and comprehensive system of values, religion aids the moral development of college youth. *See* H. Allen, *supra*, at iii; Muskie, *Religion, the University and the Future of American Society*, in *Students, Religion and the Contemporary University* xix (C. Mineman ed. 1970); E. Eddy, *The College Influence on Student Character* 120-21 (1959).

Public Universities—A Tradition of Religious Accommodation

Religion and religious activity have played a prominent role in the life of our public institutions of higher education for as long as they have existed in this country. Kauper, *Law and Public Opinion*, in *Religion and the State University* 76-79 (1958); C. Shedd, *The Church Follows Its Students* 6-12 (1938); W. Ambrose, *The Church in the University* 58 (1968). Many public universities have provided chaplains or religious coordinators on their staffs. G. Jones, *The Public University and Religious Practice* 53 (1973); Kauper, *supra*, at 78-79. Many also provide, or allow, religious centers or

other facilities on their campuses to accommodate the spiritual needs of their students, Olds, *Religious Centers,* in *Religion and the State University, supra,* at 226-47; Kauper, *supra,* at 79.

Clearly, history belies the proposition that the proper application of First Amendment principles requires exclusion of virtually all student worship and religious activity from the campus. Indeed, two of the foremost proponents of those principles, Thomas Jefferson and James Madison, fostered religious worship and spiritual development on the university campus. As members of the Board of Visitors of the University of Virginia, they expressly approved the adoption of regulations for the University of Virginia which included the following provisions:

> Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within,* or adjacent to, *the precincts of the University,* schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend *religious worship at the establishment of their respective sects,* in the morning, and in time to meet their school in the University at its stated hour.
>
> * * * *
>
> The upper circular room of the rotunda shall be reserved for a library.
>
> One of its longer elliptical rooms on its middle floor shall be used for annual examinations, for lectures to such schools as are too numerous for their ordinary school-room, *and for religious worship, under the regulations allowed to be prescribed by law.*

19 T. Jefferson, Writings 439, 449-50 (1903) (emphasis added). Further, in his letter dated November 2, 1822 to Dr. Thomas Cooper of Philadelphia, Jefferson stated:

> In our university you know there is no Professorship of Divinity. A handle has been made of this,

> to disseminate an idea that this is an institution, not merely of no religion, but against all religion. Occasion was taken at the last meeting of the Visitors, to bring forward an idea that might silence this calumny, which weighed on the minds of some honest friends to the institution. In our annal report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of *encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university,* so near as that their students may attend the lectures there, and have the free use of our library, *and every other accommodation we can give them;* preserving, however, their independence of us and of each other.

15 *id.* at 405 (emphasis added).

It is clear that the University's attempt to sever meaningful religious observance from the public university campus does violence to our academic traditions and the historical parameters of First Amendment principles. The depth of that violence is best perceived through a consideration of Article III of the Northwest Ordinance of 1787, which was reenacted by the same Congress that proposed the First Amendment. Article III provided, in part: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52.

"Benevolent Neutrality"—A Critical Principle For A Critical Phase

There are few places or circumstances that require benevolent neutrality more than a public university. The university is a community in itself and bears responsibility for all the needs of its students, most of whom have severed home ties at least temporarily. Strozier, *Analysis of the*

Student Community, in *Religion and the State University, supra,* at 195-213. They must be free to develop their social values according to religious and spiritual norms just as much as they are guided by other influences. As has already been demonstrated, this is demanded by the welfare of society in general and of students in particular.

The total exclusion of meaningful religious observance from the life of the university community would create an artificial environment out of keeping with the traditions and modes of the larger society. Spiritual and moral values would effectively be stamped as unimportant to life in our society. Such a policy fundamentally disregards Justice Goldberg's admonition in *School District of Abington Township v. Schempp,* 374 U.S. 203, 306 (1963) (Goldberg J., concurring): "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings."

"Benevolent Neutrality" Requires Affirmance

It is not the purpose of this *amicus* to elucidate or examine the applicable law. That will be done by the parties. However, it would conclude its presentation with the following remarks.

First, the issue here was also resolved by the Supreme Court of Delaware in *Keegan v. University of Delaware,* 349 A. 2d 14 (Del. Sup. Ct. 1975), *cert. den.,* 424 U.S. 934 (1976). In that case the university sought to enforce a regulation which prohibited students and priests from conducting religious worship services in the common room of the student dormitory on the basis of the Establishment Clause of the First Amendment. The court unanimously ruled that

the regulation imposed an excessive burden on the students' constitutional right to the free exercise of their religion.

Second, the petitioner urges that Missouri's constitution requires a different result because it evidences a compelling state interest in "separation" of such magnitude that it mandates the hostility to religion exhibited in this case. This *amicus* questions whether anything contained in the Missouri Constitution, or the decisions of the courts of that state, mandate such a result.[1] Nevertheless, even if the Missouri Constitution were properly so construed, such an expanded application of the so-called doctrine of "separation" would clearly offend the Free Exercise Clause of the First Amendment. No state interest of the dimensions and compelling character required to justify infringement on such a fundamental right has been articulated by petitioners. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 405 U.S. 205, 215 (1972).

The University's regulation conflicts directly with the moral and spiritual development of respondents and their fellow students, and is at variance with the history of higher public education in this country. The degree of separation of church and state espoused by petitioners goes far beyond what is necessary to advance the legitimate purposes served by separation, so far in fact that it impinges directly and palpably upon the free exercise rights of respondents and their coreligionists. For that reason, this *amicus* urges the Court to affirm the lower court decision invalidating the University's regulation.

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1. A Missouri statute from the late 19th century, Mo. Rev. Stat § 9763 (1899), authorized "the use of school houses for religious, literary or other public purposes . . . when such use shall be demanded by a majority of the voters of [school] districts voting at any annual or special meeting where such question was submitted." *State v. Kessler*, 136 Mo. App. 236, 117 S.W. 85 (Ct. App. 1909).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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